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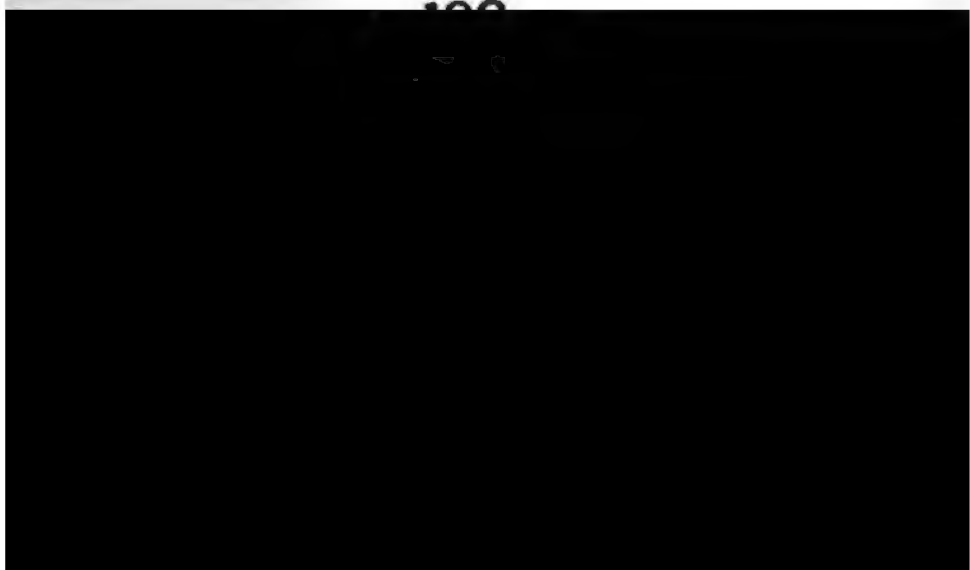
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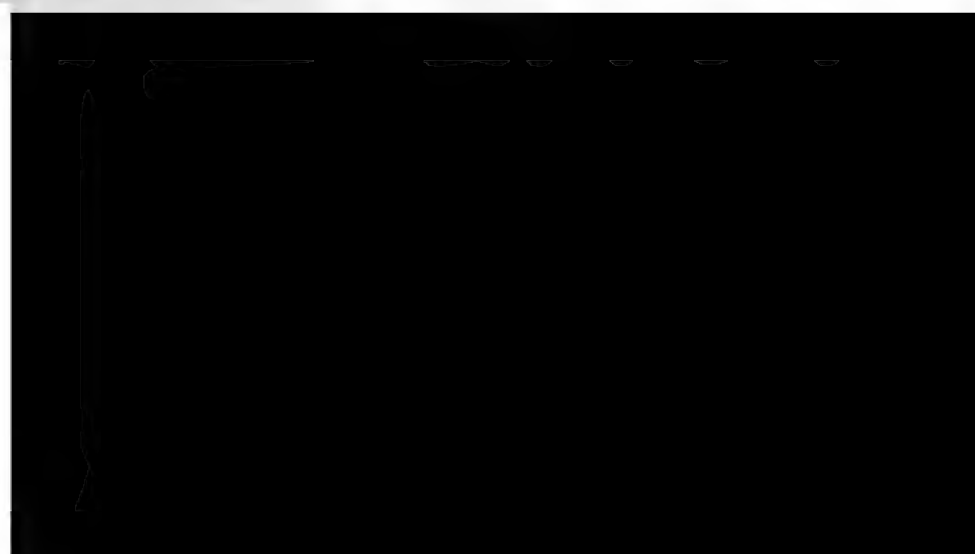


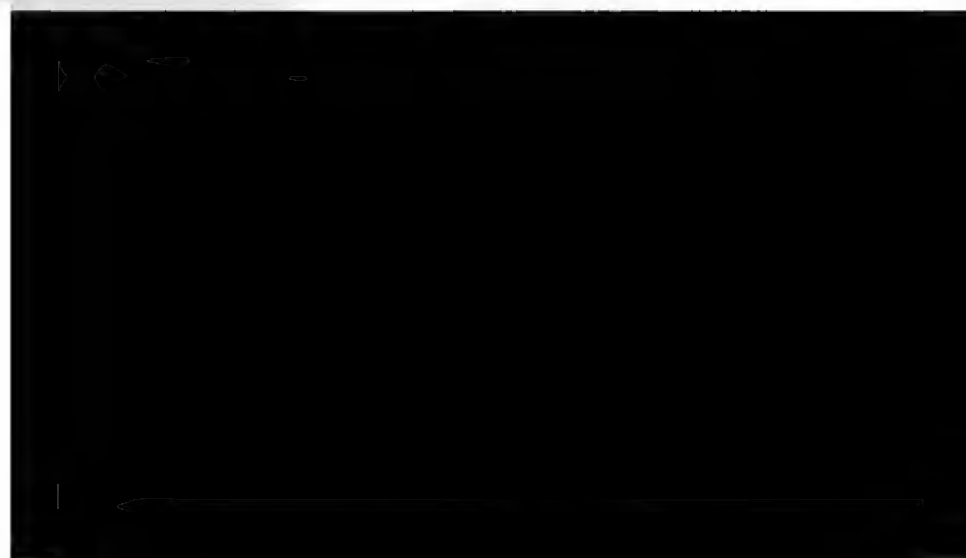
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

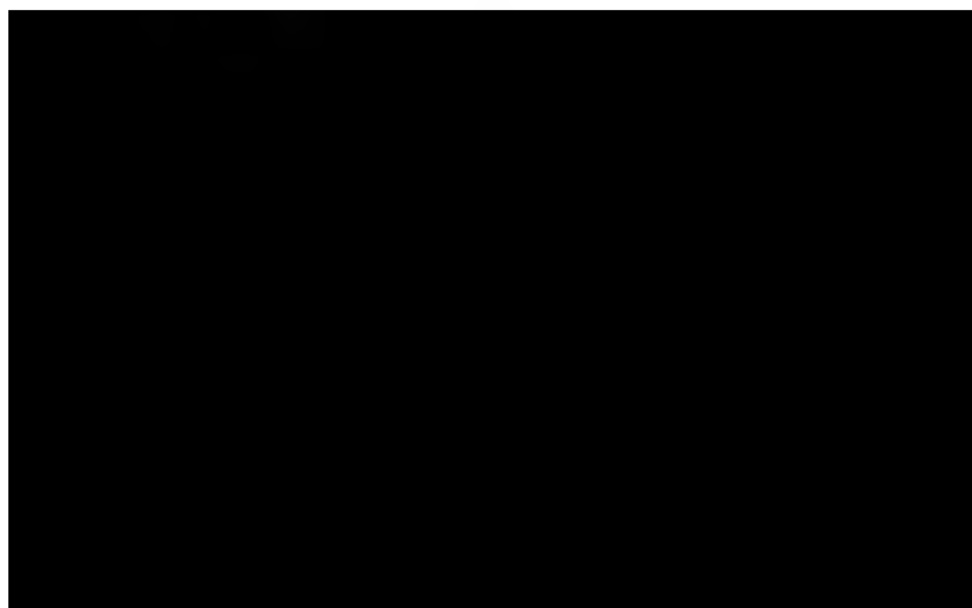
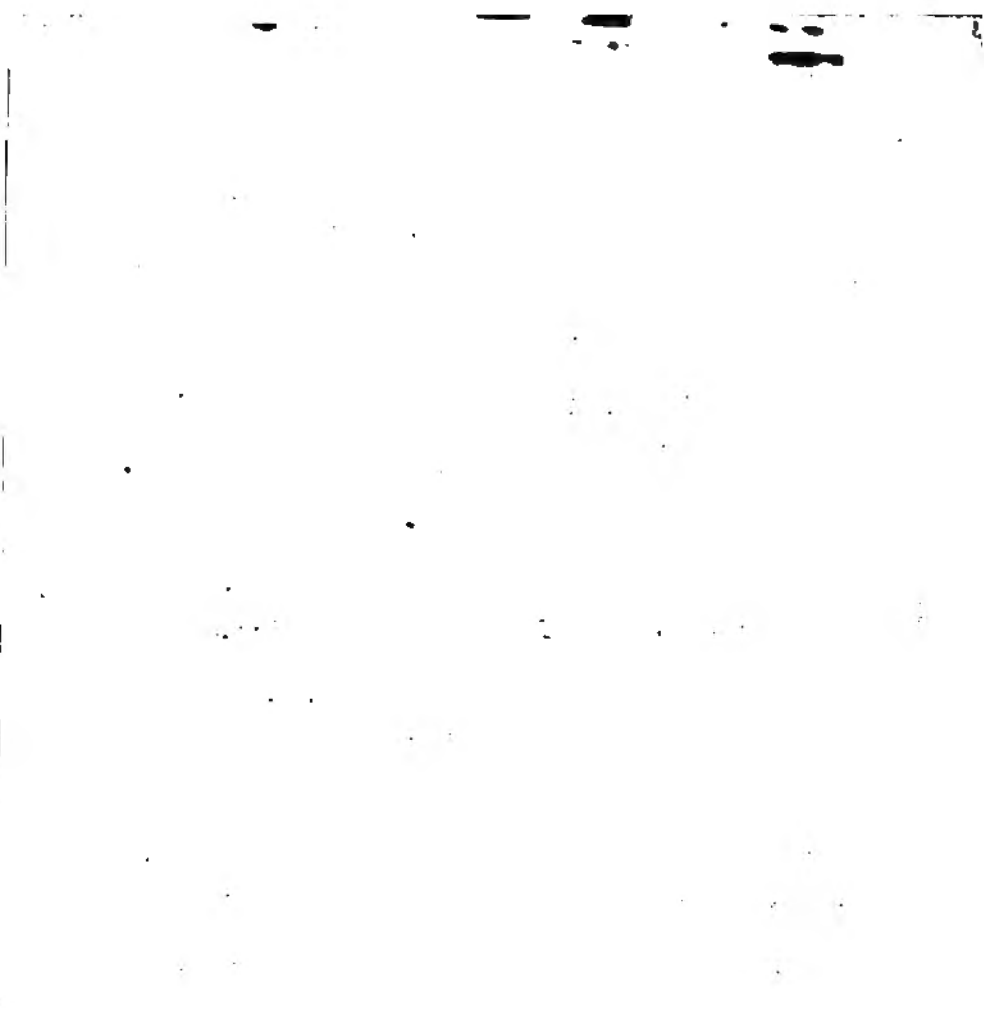
**WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.**

BY
RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

V O L. II.

**Containing the Cases of TRINITY, MICHAELMAS, HILARY, and EASTER
Terms, in the 4th and 5th Years of GEO. IV. 1823, 1824.**

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1824.



J U D G E S
OF THE
COURT OF KING's BENCH,
During the Period of these REPORTS.

Sir CHARLES ABBOTT, Knt. C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir WILLIAM DRAPER BEST, Knt.
Sir JOSEPH LITTLEDALE, Knt.

ATTORNEYS-GENERAL.

Sir ROBERT GIFFORD, Knt.
Sir JOHN SINGLETON COPLEY, Knt.

SOLICITORS-GENERAL.

Sir JOHN SINGLETON COPLEY, Knt.
Sir CHARLES WETHERALL, Knt.

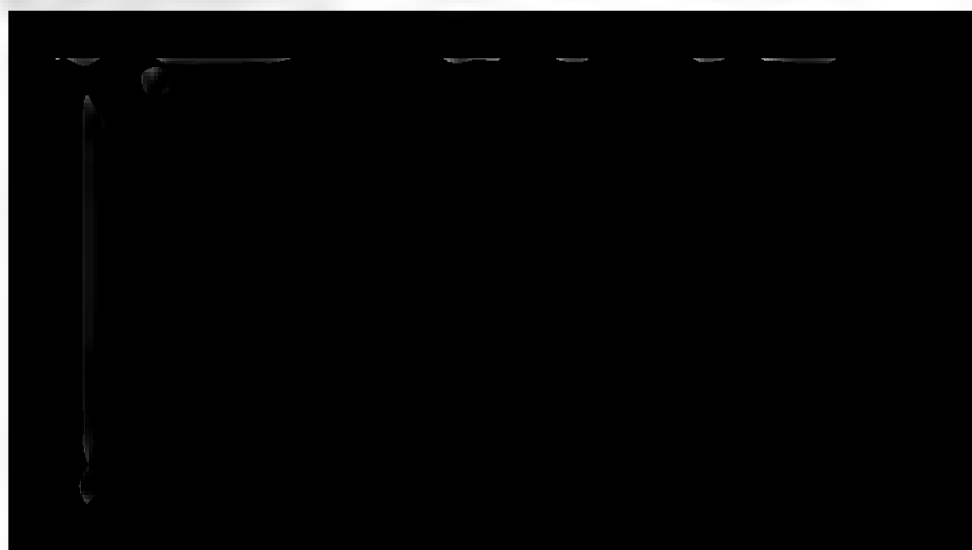


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ERRATUM.

Page 166. in marginal note, last line, instead of "law," read "tenure."

C A S E S

ARGUED AND DETERMINED

1823.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fourth Year of the Reign of GEORGE IV.

CHEEK *against* JEFFERIES.

Saturday,
May 31st.

A RULE nisi had been obtained in this case, for cancelling and vacating the bond and warrant of attorney and judgment for securing an annuity, and the execution issued thereon, on the ground that the memorial did not contain the Christian name of one of the subscribing witnesses to the securities. In the memorial the subscribing witness was described as *H. Fleming*, his name being *Harris Fleming*. The Court, after hearing

The memorial of an annuity must contain the Christian name of the subscribing witness to the securities. The initial of the Christian name is not sufficient.

Maryat, in support of the rule, and *Denman*, contra, were clearly of opinion, that the 53 G. 3. c. 141. s. 2., which required that the memorial should contain the

1823.

CHENE
against
JEREMIAS.

names of all the parties and of all the witnesses to the deed, had not been complied with, the initial not being a name, and not affording that facility of finding the subscribing witness which it was the intention of the legislature to secure.

Rule absolute for setting aside the warrant of attorney, and judgment and execution issued thereon.

Monday,
June 20.

DRAPER *against* GARRATT and Another.

Where a declaration against a sheriff for taking insufficient pledges in a replevin bond, stated that the party replevying levied his plaint "at the next county court, to wit, at the county court holden on, &c., before A., B., C., and D., suitors of the court;"

CASE against the defendants, sheriff of *Middlesex*, for taking insufficient sureties in a replevin bond. The declaration alleged that plaintiff distrained the goods of *R. Field* for rent arrear; that the defendants made deliverance of the said goods to *Field*; and that "at the next county court for the said county of *Middlesex*, to wit, at the county court of the said sheriff, holden in and for the said county, at, &c. on, &c. before *W. W.*, *A. O.*, *E. C.*, and *P. D.*, then suitors of the said court," *Field* appeared and levied his plaint against the

At the trial, before *Abbott C. J.*, at the *Middlesex* sittings after last *Easter* term, the plaintiff gave the record of the *re. fa. lo.* in evidence, by which it appeared that the plaint was levied at a court holden before *A., B., C.,* and *D.*, and not before *W. W., A. O., E. C.,* and *P. D.*, as stated in the declaration; but it was recorded before them by virtue of the writ of *re. fa. lo.* *Scarlett*, for the the defendants, contended that this was a fatal variance. The Lord Chief Justice reserved the point, and the plaintiff obtained a verdict.

1823.

 DRAPER
 against
 GARRATT.

Scarlett now moved to enter a nonsuit. The gist of the plaintiff's action is, that the sheriff took insufficient sureties; but, in order to recover, it is essential for him to shew a title to proceed against the sureties. One step towards that is the production of the record of the plaint originally levied in the county court. Now the record produced, being different from that described in the declaration, cannot be taken to be the true record. Suppose another action were brought for this same neglect, and the record were in that properly described, the defendants could not plead the former recovery; for they could not aver that the record set out in that case and in this is the same. Nor can the allegation be rejected as surplusage. There is a difference between impertinent and unnecessary allegations. The former are of matter which need not be either alleged or proved; the latter are of matter which must be proved, but need not be alleged in pleading. If, however unnecessary, allegations are made, they must be made correctly. *Bristow v. Wright* (a), *Turner v. Eyles*. (b) Suppose, in this

(a) 2 Doug. 665.


(b) 3 B. & P. 456.

1823.

DRAPER
against
GARRATT.

very declaration, where it is alleged that the plaint was removed into the court of our lord the king, the words "of the bench" had been added, surely they could not have been rejected as surplusage; and yet there appears to be no reason for not rejecting those words, which is not equally applicable to the matter now before the Court.

ABBOTT C. J. I quite agree with the distinction that has been taken between what is unnecessary to be alleged, and what is altogether immaterial. Applying that distinction to the present case, I am satisfied that we ought not to listen to this application. It was necessary to prove that at the next county court after the replevin *Field* levied his plaint; but it was perfectly unnecessary to prove who were the suitors before whom that court was held. That allegation was, therefore, immaterial, and might have been left out of the declaration; and then it would have run thus, "And the plaintiff further saith, that at the next county court for the said county of *Middlesex*, *R. Field* appeared and levied his plaint;" that is the material part of the allegation, and that was proved as alleged. There are



which stated the indictment to have been found at the *general* sessions, omitting the word *quarter*. Upon this variance the plaintiff was nonsuited. A motion was afterwards made for a new trial, and, after time taken to deliberate, the rule was made absolute, and the judgment of the court was delivered by *De Grey* C. J. After adverting to the sessions being held eight times a-year in *Middlesex*, and that four are called *general quarter* sessions, and the other four *general* sessions, he observes, that both have an equal jurisdiction to take and try indictments; and then proceeds thus, "Now it is held in *Barns v. Constantine* (a), (and we all concur in the same opinion,) that where the declaration sets out a court that has authority to proceed, it need not exactly copy the style set out in the record." In this case the declaration does set out a court that had authority to proceed, viz. the next county court; it is unnecessary to state or prove before what suitors it was held. Besides, the allegation is under a *scilicet*, which has a very healing operation. For these reasons, I think that the variance insisted upon was immaterial, and that the allegation was in substance proved; the rule prayed for must, therefore, be refused.

1823.

 DRAPER
 against
 GARRATE.

BAYLEY J. The whole of the allegation in question was under a *scilicet*, and, if it was substantially proved, that is sufficient. Now the material part of the allegation is, that at the next county court the plaint was levied; and that was proved. Besides the case referred to by my Lord Chief Justice, there are two more modern cases, in which the Court have put questions


(a) *Cro. Jac.* 32. *Yelv.* 46. *S. C.*

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DRAYER
against
GARRATT.

of this nature upon a reasonable and beneficial ground; and, as far as they can, have prevented parties from being turned round on matters of form which have no connection with the justice of the case. In *Purcell v. Macnamara* (a), which was an action for a malicious prosecution, the declaration stated that the plaintiff had been tried and acquitted on the morrow of the *Holy Trinity*; it appeared by the record, when produced, that the trial took place on *Tuesday* next after the end of *Easter* term, and that variance was held to be immaterial, because it was only necessary for the plaintiff to prove that he was acquitted before his action was commenced. The same principle was recognised and acted upon in *Phillips v. Shaw* (b), where the declaration alleged that a judgment was recovered in *Michaelmas* term, whereas the record proved it to have been recovered in *Hilary* term. Upon these authorities, I think that the variance in this case was immaterial.

HOLROYD J. I am of opinion that this rule must be refused, both upon principle and authority. The allegation in question was under a scilicet, and was proved in substance. The material part of it was, that *Field*



stated the judgment in the former suit to be, that the then plaintiffs and their pledges to prosecute should be in mercy. The record, when produced, had not the words, "and their pledges to prosecute;" but the court held that those words might be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit. I am, therefore, of opinion that the names of the suitors may be rejected as surplusage in this case; and, if so, the variance is immaterial.

1823.

DRAPER
against
GARRATT

BEST J. concurred.

Rule refused. (a)

(a) See *King v. Pippet*, 1 T. R. 235., where many authorities to the same effect are collected; and *Rex v. Leeke*, 2 Camp. 139.

SARQUY and Another *against* HOBSON.

ASSUMPSIT upon a policy of insurance on goods.

The declaration alleged a loss by perils of the seas.

Plea, general issue. At the trial before *Abbott C. J.*, at the sittings after term, a verdict was found for the plaintiffs, subject to the opinion of the Court, on the following case:

The plaintiffs, on the 12th *May*, 1817, effected a policy of insurance on *West India* produce in the ship *Pekin*, at and from *Jacmel* to the ship's port of discharge in *Europe*, without the *Mediterranean* and *Baltic*, with liberty to take in produce at the two contiguous ports of

Upon a policy of insurance on goods, the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in pay-

ment of these expenses: Held, that the underwriter was not answerable for this loss.

1823.

SARGENT
against
Hosson.

Acquin and *Aux Cayes*, and to proceed to *St. Lago*, in the island of *Cuba*, to finish her loading, and wait at or off any port in the channel for orders, or otherwise. The defendant subscribed the policy of assurance for 500*l*. The plaintiffs were interested to the full amount of the policy which was effected on their own account. On th 30th *May*, 1817, the ship *Pekin* was in safety in the island of *Cuba*, and was there laden by the plaintiffs with *West Indian* produce, and thence set sail to her port of discharge in *Europe*. In the course of her voyage the *Pekin* was overtaken by a tempest, and sprung a leak, and made so much water that it became necessary for the preservation of the ship and cargo, to make for the nearest port, which turned out to be the *Havannah*, to which port the master, after consultation with the crew, proceeded. Upon the arrival of the *Pekin* at the *Havannah* it became necessary, for the purpose of ascertaining the cause of her leaking, to discharge the cargo, which was accordingly done; and surveys of the ship having been held, it was found expedient to remove the copper sheathing, in order to get at the leak, which was done; and the ship was repaired, new-caulked, and refitted for sea. Without these repairs the ship could

so sold, and the ship then proceeded on her voyage, and arrived in safety at her port of discharge in *Europe*, where the remainder of her cargo was duly delivered. The defendant paid to the plaintiffs the sum claimed as his contribution in respect of his subscription of the policy, as for a general average loss on the plaintiffs' goods insured as aforesaid.

1823.

 SARQUY
 against
 HOSSEN.

F. Pollock, for the plaintiffs. The plaintiffs are entitled to recover from the defendant, the underwriter on goods, the value of the goods sold for the purpose of repairing the ship. The repairs were rendered necessary by a peril of the sea. The assured were entitled to abandon when the ship put into a port out of the course of her voyage, for it was then likely that a total loss would ensue. It is sufficient for that purpose if the property be lost to them, although it remain entire. Now here, in consequence of a peril of the sea, the vessel, in distress, put into a port out of the course of her voyage: the goods insured from that moment became lost to the assured. It is true there has been no abandonment; and in consequence of the repairs having taken place, the loss upon the ship and the other parts of the cargo has become an average loss; but as to the goods in question, (which were sold for the purpose of repairing the ship,) they continue totally lost to the assured. If the underwriter be not liable, then there will be a peril, against which there will be no complete indemnity. The case of *Powell v. Gudgeon* (a) is certainly in point; but that, for the reasons already given, cannot be supported.

Campbell, contra, was stopped by the Court.

(a) 5 M. & S. 431.

Per

1823.

BARQUE
against
Hosson.

Per Curiam. The case of *Powell v. Gudgeon* was properly decided, and is expressly in point. The loss of the goods in this case did not arise from any peril of the sea. The sale of the goods was rendered necessary, not by the peril of the sea, but by the inability of the captain to find money in any other way to repair the ship. The mere interruption of the voyage will not entitle the assured to abandon. There must have been a total loss at some period of the voyage.

Judgment for defendant.

Tuesday,
June 3d.

UPSTONE and Another *against* MERCHANT.

A bill was in fact drawn on the 21st day of December for 21*l.* payable two months after date; but on the face of it purported to bear date on the 31st of Decem-

DECLARATION by the indorsee against the acceptor of a bill of exchange, alleged to have been drawn on the 31st *December*, 1822. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after last term, it appeared that the bill was in fact drawn on the 21st *December*, by one *John Bucke*, for 21*l.* 9*s.*, payable

2s. 6d. was required. The 55 G. 3. c. 184. schedule title *Bill of Exchange*, required a stamp of 2s. for bills for sums exceeding 20l. but under 30l., not exceeding two months' date; but when they exceed two months' date, then a stamp of 2s. 6d. Here the bill had two months and ten days to run, from the 21st, the day on which it was drawn. The Lord Chief Justice overruled the objection, and the plaintiff had a verdict. *Marryat* now moved for a new trial, and re-urged the objection; but the Court were clearly of opinion that the word "date" in the stamp act was intended to denote the period of payment on the face of the bill itself, and therefore refused the rule.

1823.

UPSTONE
against
MARCHANT.

Rule refused. (a)

(a) The same point was decided at Nisi Prius in *Peacock v. Murrell*, 2 Stark. 558.

SCRACE, Gent., one, &c., against WHITTINGTON,
Gent., one, &c.

Tuesday,
June 3d.

ASSUMPSIT for money due to the plaintiff, for work and labour, care and diligence, journeys and attendances, as an attorney and solicitor; and for fees due and of right payable to him, with the usual common

The attorney to a commission of bankrupt applied to the attorney of a mortgagee of premises belonging to the bankrupt to join

in the sale of the mortgaged premises. The mortgagee having consented, her attorney requested the bankrupt's attorney to prepare, on the part of the mortgagee, requisitions to the commissioners of bankrupt to ascertain the amount of principal and interest due upon the mortgage, &c. The latter did so. The sale did not afterwards take effect. In an action brought by the bankrupt's attorney against the mortgagee's attorney for the amount due for the business done, it was held that the question was properly submitted to the jury, whether the credit was given to the defendant; and the jury having found that it was, that the attorney was liable, although at the time when the business was done it was known to be done for the benefit of the mortgagee.

counts.

1823.

SCRAKE
against
WARRINGTON.

counts. Plea, general issue. At the trial before *Abbott C.J.* at the *Middlesex* sittings after last term, the following facts appeared in evidence: The plaintiff resided at *Bath*, and was solicitor to a commission of bankrupt issued against one *Budget*, of which *Brine* was assignee. The defendant resided at *Chipping Sodbury*, and was solicitor to Miss *Smallcombe*, who was a mortgagee of certain premises belonging to the bankrupt. The plaintiff applied to the defendant to advise his client to join in the sale of the mortgaged premises. The defendant afterwards informed the plaintiff that Miss *Smallcombe* had consented to join in requiring the sale of the estate. These conversations took place at *Bath*. The defendant being absent from home, requested the plaintiff to prepare the necessary papers on the part of Miss *Smallcombe*, and to expedite the sale. The latter did so; and prepared requisitions from Miss *Smallcombe* to the commissioners of bankrupt, to ascertain the amount of principal and interest due, and to order a sale of the bankrupt's effects, and also an affidavit of debt. Miss *Smallcombe* signed the requisition, but never had any communication with the plaintiff. The sale did not take effect, and the plaintiff claimed of the defendant the

when the name of the principal is disclosed at the time of the contract, because it was the usual course of business between attorneys, when employed by one another, to look for payment to the attorney and not to his client. This was universally the practice between country attorneys and their agents in town; and he therefore told the jury, that if they thought upon the evidence that the plaintiff had given credit to the defendant for the business done, they should find a verdict for the plaintiff. The jury having found for the plaintiff,

1828.

 SCRACE
 against
 WITTINGTON.

Campbell now moved for a new trial, and contended that this case did not form any exception to the general rule. In *Hartop v. Jukes* (a) and *Hart v. White* (b) it was held, that an attorney who sued out a commission of bankrupt was not to be regarded as a principal, so as to make him liable to the messenger under the commission. *Burrell v. Jones* (c) and *Iveson v. Conington* (d) only establish, that an attorney may, by an express undertaking, make himself personally liable for the debt of his client. Here there was no express undertaking. The defendant, therefore, in this case, is not liable, although the plaintiff gave him credit for the business done, for he had no right to charge him with it.

Per Curiam. The question was properly left to the jury. It is a common practice for one attorney to do business for another. The attorney for whom the business is done generally makes the other some allowance out of the profits. The attorney who does the busi-

(a) 2 M. & S. 438.

(b) Holt, N. P. C. 76.

(c) 3 B. & A. 47.

(d) 1 B. & C. 160.

1823.
 ———
 SCRACE
 against
 WESTINGTON.

ness universally gives credit to the attorney who employs him, and not to the client for whose benefit it is done. An attorney doing business for another attorney may therefore give credit to that person to whom it is given in the usual course of such business, viz. to the attorney and not to the client. Here the jury have found that the credit was given to the defendant; and the law, therefore, will, from the usage of the business, raise an implied contract on the part of the latter to pay. If an attorney in such a case intends not to be personally responsible, it becomes his duty to give express notice that the business is to be done upon the credit of the client.

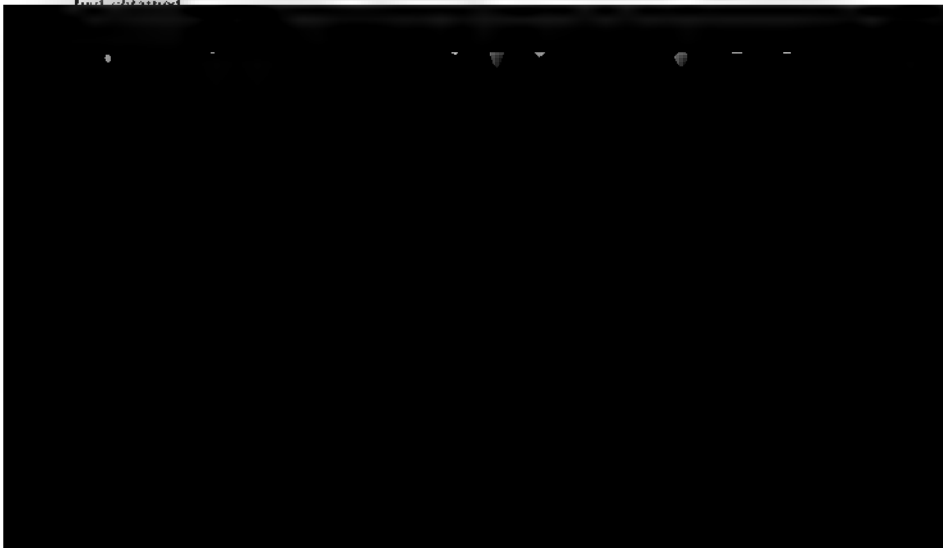
Rule refused.

Wednesday,
 June 4th.

JOHN MORGAN, Assignee of the Estate and Effects of JOHN JONES, a Bankrupt, *against* WILLIAM PRYOR.

In an action by
 the assignee of
 a bankrupt who
 had obtained

DECLARATION on a policy of insurance effected by Jones before his bankruptcy. Plea, general



the commissioners to the several documents. It was objected for the defendant, that the bankrupt was incompetent, as he came to support his commission. The Lord Chief Justice overruled the objection, and the plaintiff obtained a verdict; but the defendant had leave to move to enter a nonsuit. In *Michaelmas* term a rule nisi for entering a nonsuit was granted, against which

1823.

MORGAN
against
PRYOR.

The *Solicitor-General* and *Parke* now shewed cause. The bankrupt was a competent witness to prove that for which he was called. He did not give evidence as to any fact necessary to support the commission, but merely identified the proceedings as those taken under a commission issued against him, and proved the handwriting of the commissioners, which was in fact unnecessary. It may be collected, from *Chapman v. Gardner* (a) and *Flower v. Herbert* (b), that a bankrupt has been held incompetent to prove any fact in support of the commission, on the ground that the Lord Chancellor would, on application to him, supersede it, if the assignees in an action at law were unable to establish the bankruptcy; but it cannot be supposed that a commission would be superseded merely for a defect of proof as to the identity of the party named in the proceedings under the commission. It is even doubtful whether the proceedings were not made evidence by the mere production of them by the solicitor to the commission; for in *Rex v. Netherthong* (c), a rated inhabitant of a respondent parish produced a certificate given by the

(a) 2 H. BL. 279.

(b) *Ib.* n.

(c) 2 M. & S. 537.

appellant

1823.

MORGAN
against
PAYOR.

appellant parish, and it was received without further evidence, as coming from the proper custody.

Scarlett and P. Pollock, contra. It is too late now to enquire into the principle upon which a bankrupt has been considered incompetent to support his commission. Whatever that principle may be, it is an invariable rule in practice, that a bankrupt cannot prove any fact necessary for that purpose. If the bankrupt in this case be held competent to prove the identity of the documents produced, he is in fact admitted as a witness to prove the whole bankruptcy; for through his testimony the proceedings were made evidence. Suppose a trader, during his absence from home, wrote a letter explaining the cause of it, why might he not, if admissible here, be admitted after bankruptcy to prove his hand-writing to that letter? Or if a petitioning creditor's debt depended on the bankrupt's signature to an account, or a bill of exchange, why might he not be called to prove it? But it is quite clear, that in those cases his evidence could not be received. The 49 G. 3. c. 121. s. 10. only meant that the facts set forth in the proceedings should be con-

cause; and, consequently, there is nothing to shew that they came from the proper custody.

1823.

MORGAN
against
PRYOR.

ABBOTT C. J. I am of opinion that this rule must be discharged. The motion was made on the ground that the bankrupt was improperly admitted at the trial as a witness to prove the identity of the proceedings under the commission against him. The bankrupt had obtained his certificate, and released the surplus of his estate; he therefore had not any immediate interest in the event of the suit, and for general purposes was a competent witness. But a rule has been long established, that a bankrupt cannot give evidence to prove any fact necessary to give validity to the commission. The 49 G. 3. c. 121. s. 10. has dispensed with certain proofs which the common law required, and has provided that the proceedings of the commissioners shall be received as evidence of the petitioning creditor's debt, of the trading, and bankruptcy, unless notice be given of an intention to dispute those matters. The bankrupt was not in this case called to prove any of those facts, but merely the signature of the commissioners. The validity of the commission does not depend upon that signature, but upon the facts contained in the depositions to which the signature is subscribed. To prove that signature he certainly was competent, for the signature was not necessary to support the validity of the commission.


BAYLEY J. I am of opinion that the bankrupt was a competent witness to prove that for which he was called, although incompetent to prove any fact necessary to support the commission. It has been said that it is

1823.

—
MORGAN
against
PAYOR.

too late now to enquire into the principle upon which a bankrupt has been held incompetent for that purpose. I think it is also too late to extend the rule beyond the letter of former decisions. It appears to me that the rule was founded upon the principle of interest in the bankrupt. Before the 49 G. 3. c. 121. was passed, the assignees of a bankrupt were bound to produce witnesses to prove the trading, the petitioning creditor's debt, and the act of bankruptcy; and if they were unable to do that, it formed a ground upon which the Lord Chancellor might possibly supersede the commission. That would render the certificate inoperative; and therefore the bankrupt was considered interested in the support of the commission. But merely failing to prove the hand-writing of the commissioners, is not a ground upon which the Lord Chancellor would think of superseding a commission. The principle upon which the former decisions proceeded does not then apply to this case, and the bankrupt was properly received as a witness.

HOLROYD J. I think that if we held the bankrupt to be incompetent as a witness in this case, we should



of a witness; and accordingly it has been held, that in an action by assignees, although the bankrupt may be a witness for other purposes, yet he cannot prove the act of bankruptcy, trading, or petitioning creditor's debt, because those circumstances are necessary, not only to the action, but to the commission itself. The case in *2 H. Bl.* shews that the bankrupt was considered interested in proving each of those facts, lest proceedings should be had to supersede the commission; and for that reason he was considered as incompetent. Here the bankrupt was not called to prove those facts themselves, but something which would have the effect of letting in other evidence of those facts; and the failure to prove that other matter, would not be likely to affect the commission. For these reasons, I think, that in rejecting the bankrupt in this case, we should be going beyond the old principle; and, consequently, that the rule for a nonsuit must be discharged.

1828.

MORGAN
against
PAYOR.

BEST J. The principle upon which bankrupts have been considered incompetent to give evidence in support of the commission, may be collected from *Flower v. Herbert*. I cannot, indeed, agree with that principle, because I think that the Lord Chancellor would not supersede a commission in consequence of any thing that passed in this court, but would himself enquire into the matter. I should, nevertheless, feel bound by that authority, if this case were precisely similar. But it is not so; and for the reasons already given, I think we should go far beyond the old rule, were we to hold that the bankrupt was not competent to identify the proceedings, by proving the hand-writing of the commissioners.

1823. Being of opinion that the rule ought not to be extended,
I agree in thinking that the plaintiff is entitled to retain
the verdict.

MORGAN
against
PAYNE.

Rule discharged.

Wednesday,
June 4th.

LATHAM and Others *against* RUTLEY and Others.

Declaration,
that for certain
hire and reward
defendants un-
dertook to carry
goods from
London and
deliver them
safely at *Dover*.
The contract
proved was, to
carry and de-
liver safely
(fire and rob-
bery excepted):
Held, that this
was a variance.

ASSUMPSIT against the defendants, common car-
riers between *London* and *Dover*. The declaration
stated that the plaintiffs, at the request of the defend-
ants, delivered to them a parcel of country bank notes
of great value, to wit, &c., to be carried from *London* to
Dover, and there delivered; that the defendants in con-
sideration thereof and for certain reward in that behalf,
undertook to deliver them safely, but that through their
negligence the parcel was lost. Plea, general issue.
At the trial before *Abbott C. J.* at the *London* sittings
after *Trinity* term, 1822, it appeared that the plaintiffs
were bankers at *Dover*, and were in the habit of sending
Bank of *England* notes to their correspondents in *Lon-*
don to take up their own notes and bills, and of receiv-

parcels from *London* to *Dover* must be taken to be the same as that for the carriage from *Dover* to *London*, and that the contract proved was not the same as that stated in the declaration. The Lord Chief Justice left it to the jury to say whether the contract was in both cases the same; and, if so, whether this was a loss by robbery. The jury found that the contract for the carriage of this parcel was subject to the exception of fire and robbery; but that the loss was not by robbery, within the meaning of that exception; and a verdict was taken for the plaintiffs. In *Michaelmas* term *Scarlett* obtained a rule to enter a nonsuit, on the ground of a variance between the contract found by the jury and that stated in the declaration, against which

1823.

 LATHAM
 against
 RUTLEY.

The *Solicitor-General*, *Denman*, and *Kaye*, now shewed cause. The jury having found that the loss was not by robbery within the meaning of the contract, the plaintiffs are entitled to retain the verdict. The action is founded on the common law liability of carriers; and the proviso introduced in their favour does not alter the nature of the contract to be declared upon: but if the loss had happened by either of those causes, that was matter of defence to be established by evidence. [*Holroyd J.* It does not appear that the defendants received the goods upon their common law liability.] The defendants must rely upon the technical meaning of the word "exception," as opposed to proviso; for in *Clarke v. Gray* (a) it was held that a provision that the carrier should not be responsible for more than 5*l.* did not form any part of the contract itself, and need not

(a) 6 *East*, 564.

1823.

LATHAM
against
RUTLEY.

be noticed in the declaration ; and in *Cotterill v. Cuff* (a), and *Miles v. Sheward* (b), it was held sufficient to state the consideration, and so much of the defendant's promise as could be proved to have been broken.

ABBOTT C. J. The distinction attempted to be established between an exception and a proviso is very subtle, and was not relied upon at the trial. The question there made was, whether the defendants carried parcels for the plaintiffs from *London to Dover*, and from *Dover to London*, upon the same terms ; and the jury found that they did. However reluctant we may be, still we cannot help yielding to the objection taken. The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading ; but if a stipulation be made, that under certain circumstances he shall not be liable at all, that must be stated. Now here it appeared that in either of two events the carrier was not to be responsible at all ; and that exception was not stated in the declaration. The plaintiffs would have been nonsuited but for the necessity of leaving it to the jury to say what was the contract. The defendants are, therefore,

1823.

JOHN ATKINS and WILLIAM ATKINS, Executors of JOHN ATKINS, against HENRY TREDGOLD, ROBERT TREDGOLD, JAMES ROLFE, and JOHN KNIGHT, Executors of JOHN TREDGOLD, deceased.

DECLARATION in assumpsit upon three promissory notes made by *John Tredgold*, deceased, and payable on demand to *John Atkins*, deceased. The first bore date the 17th *January*, 1806, and was for 300*l.* The second was for 200*l.*, and bore the same date. The third was for 300*l.*, and bore date the 17th *January*, 1809. There were counts for interest for money paid, lent and advanced, had and received, and upon an account stated between the two testators. In all these counts the promises were alleged to have been made by *John Tredgold*, deceased, to *John Atkins*. Another count stated that *John Tredgold*, before his decease, was indebted to *John Atkins*, in his lifetime, for principal and interest upon the several promissory notes mentioned in the former counts, and for money lent and advanced, money had and received, money paid, laid out, and expended, and for money due and owing from *Tredgold* to *John Atkins* upon an account stated between them; and that *John Tredgold*, since deceased, in his lifetime, being so indebted, and the said several sums of money remaining wholly due and unpaid, the said defendants, as executors as aforesaid, after the death of *Tredgold*, and before the death of *Atkins*, promised *Atkins* to pay him the said sums of money, upon request. There was another count upon an account stated between the defendants as executors, and *Atkins*, and a

A and *B.* made a joint and several promissory note. *A.* died, and ten years after his death *B.* paid interest upon the note. In an action brought upon the note against the executors of *A.*, it was held that the payment of interest by *B.* did not take the case out of the statute of limitations, so as to make *A.*'s executors liable.

1823.

ATKINS
against
TREDGOLD.

promise by the defendants as executors to pay the sums then found to be due. The defendants pleaded, as to the first set of counts, that *John Tredgold* did not promise; upon which issue was joined. Secondly, to those counts that the cause of action did not accrue within six years; upon which issue was tendered and joined. And as to the promises in the latter set of counts, that the executors did not promise; upon which issue was joined. And further, as to the promises in those counts, that the defendants did not, within six years, promise; upon which issue was also tendered and joined. The defendant *Knight* also pleaded he unques executor, upon which issue was tendered and joined; and also that no goods or chattels of the testator ever came to his hands to be administered; as to which the plaintiffs, in their replication, prayed judgment of assets quando acciderint. At the trial, before *Abbott C. J.*, at the *London* sittings after *Trinity* term, 1822, the three promissory notes stated in the declaration were produced in evidence; by them, *John Tredgold* and *Robert Tredgold* jointly or severally promised to pay on demand the several sums therein mentioned. It appeared that *Atkins* had lent to *Robert Tredgold* the money for which the promissory notes

and by his will appointed the plaintiffs his executors. Upon these facts the Lord Chief Justice told the jury, that *John Tredgold* having died eleven years (a) before the commencement of the action, no express promise could have been made by him within six years; and therefore that the verdict upon the first set of counts must be for the defendants. And as to the question arising upon the pleas to the second set of counts, viz. whether there was any promise by the executors within the six years, he told the jury, that if they thought that the payments made by *Robert Tredgold* were made by him in his character of executor, they should find for the plaintiffs upon those counts. If, however, they thought the payments were made by him on his own account, as the joint maker of the notes, then they were to find for the defendants. The jury having found a verdict for the defendants, a rule nisi was obtained in last *Michaelmas* term for a new trial, on the ground that the payment of interest within six years by *Robert Tredgold*, who was one of the joint makers of the note, even on his own account, was an admission of an existing debt due upon the note itself; and, upon the authority of *Whitcomb v. Whiting* (b), took the case out of the statute, even against the representatives of the other joint promiser.

1823.

 ATKINS
 against
 TREDGOLD.

The *Solicitor-General*, (with whom were *Scarlett* and *E. Lawes*,) now shewed cause. The jury have found, upon the evidence, that there was no promise by the defendants, as executors. The question therefore is, whether the payment of interest within six years, by one of two persons jointly and severally liable on a promissory note, after the death of the other, is such an admission of the existence of the debt as will bind the

(a) The action was commenced in *January* 1822.(b) *Doug.* 651.

executors

1823.
ATKINS
against
TREDGOLD.

executors of the deceased person. Considering this as a several note, it is quite clear that a payment of interest by *Robert Tredgold* could not affect *John*, or his executors. Considering it as a joint note, *Robert*, after the death of *John*, would be liable as survivor; and, consequently, payment made by him on account of the note would be a payment in his own right, and not in right of the personal representatives of the parties jointly liable with him. Such a payment would, therefore, operate as an admission of an existing debt due from him only. In *Whitcomb v. Whiting* (a) the four joint promisers were all alive at the time when the payment of interest was made by one; at that time they were all jointly liable on the note. Here, at the time when the payment of interest took place, the joint liability had ceased by the death of *John*, and *Robert* became the only person liable. He was then stopped by the Court.

Gurney and Schryn, contra. It has never been decided that the effect of the statute of limitations is to cancel or extinguish the original demand. In *Leaper v. Tatton* (b) Lord *Ellenborough* says, "The promise is an acknowledgment by the defendant that he had not

pay. It is true, that in the late case of *Pittam v. Foster* (a), this Court seems to have been of opinion, that the effect of the new promise is to give a new cause of action. The uniform course of pleading, however, is at variance with that doctrine; for the original cause of action, and not the new promise, is always declared on. They cited *Green v. Cooke* (b), *Heylen v. Hastings* (c), and *Hickman v. Walker*. (d) It is true, that in *Bland v. Haselrig* (e) it was decided, that the acknowledgment of one out of several who were jointly indebted, did not prevent the operation of the statute of limitations in favour of the others; but that case was overruled by the case of *Whitcomb v. Whiting*. (f) As to the plea of ne unques executor, the fact of *Knight's* being named in the will as executor, is sufficient evidence of his having been once executor, so as to entitle the plaintiff to a verdict on that issue; and he cited *Wentworth, Executors*, 184. (g)

1823.

 ATKINS
 against
 TREDGOLD.

ABBOTT C. J. I think the rule for a new trial must be discharged. The plaintiffs have in one set of counts declared upon three promissory notes payable on demand, made by *John Tredgold*, in his lifetime, and the promise to pay is alleged to have been made by him. To those counts the defendants have pleaded, that *John Tredgold* did not promise within six years. It appeared in evidence that *John Tredgold* had died eleven years before the action was brought; and therefore no such promise could be made. Then there was another count, stating that *John Tredgold* was indebted upon the

(a) 1 B. & C. 248.

(b) 2 Ld. Raym. 1101. S.C. 6 Mod. 309.

(c) 6 Mod. 309.

(d) Willes, 27.

(e) 2 Vent. 151.

(f) Doug. 651.

(g) But see also *Wentworth*, p. 42., and the *Year-book*, 27 Hen. 8. pl. 26., and 9 Edw. 4. pl. 33., and *Bac. Abr.* tit. *Executors*, (E. 9.)

note,

1823.

ATKINS
against
TREDGOLD.

notes, and died leaving the monies unpaid; and that the defendants as executors, in consideration thereof, promised to pay; and there was also a count upon an account stated, and a promise by the executors. The question for the Court therefore is, whether any promise to pay has been made by the defendants as executors. I cannot agree with the argument, that the mere existence of a debt owing by the testator is evidence of a promise to pay by the executors as executors. There is certainly no authority for that position; and if that be so, then we must seek for evidence of that promise, aliunde. Now the evidence given was, that *Robert Tredgold* paid interest in 1816. The jury have found that he paid it in his own right, and not in the character of executor. There was not, therefore, any thing done by the executors, in that character; and that being so, I should feel a difficulty in saying that a case was made out on those counts, independently of the statute. But there is also a plea, that the defendants did not promise within six years. I think there is no evidence of a promise by all, and certainly not such as to take the case out of the statute of limitations. The evidence was, a payment of interest by *Robert Tredgold* in his own right. *Whit-*

plied promise by them all. Such a decision would introduce great difficulty in administering the affairs of testators. Suppose an executor to have waited six years, and then no claim having been made, to dispose of the assets in payment of legacies. He might, if the plaintiffs were to prevail, be subsequently rendered liable to the payment of demands to any amount, by the acknowledgment of a person originally joint debtor with the testator. The inconvenience and hardship arising from such a liability satisfies me that the principle of *Whitcomb v. Whiting* ought not to be extended to this case. For these reasons I think this rule must be discharged.

1823.
 ———
 ATKINS
 against
 TREDGOLD.

BAYLEY J. My opinion in this case is founded, not upon the case of *Pittam v. Foster*, but upon independent grounds. The plaintiffs cannot take the case out of the statute, as to the first set of counts, because the testator had been dead ten years before the action was brought. But they seek to do that as to the other counts, by shewing an acknowledgment made by one of several who were liable; but that is not the legal effect of the payment made by *Robert Tredgold*. It is said, that a joint promiser having made a payment within six years, the executors of the other are liable; and the case of *Whitcomb v. Whiting* is relied upon. That is certainly a very strong case, and it may be questionable whether it does not go beyond proper legal limits. But that case is distinguishable from the present in two particulars. Here, the statute appears to have attached before the payment was made by *Robert Tredgold*; and therefore *John Tredgold*, being at that time protected, could not be subjected to any new obligation by the act of *Robert*. And, secondly, the parties sought to be charged in this action

1823. action by means of an implied promise are not those
originally liable, as was the case in *Whitcomb v. Whiting*.
I entirely agree with my Lord Chief Justice, that we
ought not to extend the doctrine of that case to exe-
cutors.

HOLROYD J. I, also, am of opinion, that the cir-
cumstances of this case do not take it out of the statute
of limitations. *Whitcomb v. Whiting* is the only case
that can be relied on by the plaintiffs. That case has
gone far enough; but it does not govern the present.
There, the defendant *Whiting* was liable, upon a joint
promise, at the time when the payment was made. The
Court decided, that when one of two joint promisers
pays a part, that was to be considered in law as a pay-
ment by both. But here, at the time when the pay-
ment was made by *Robert Tredgold* the joint contract
had ceased to exist; for it was determined by the death
of *John Tredgold*. The note then became the several
note of the parties to it. To hold such a payment to
raise an implied promise sufficient to bind the defend-
ants, would be to decide, that, where the promises are
several, a promise by one party would bind the rest.

office. I much doubt that; but it is unnecessary to decide upon that ground(a), inasmuch as this case is distinguishable from *Whitcomb v. Whiting*, even if that be law. Here, at the time when the payment was made by *Robert Tredgold*, he was not connected in a joint contract either with *John Tredgold* or his executors. His separate character only remained.

1823.

ATKINS
against
TREDGOLD.

BEST J. The counts on promises by the testator are disposed of by *Pittam v. Foster*. Then, as to the others, it is sufficient to say, that the implied promise not having been made by *Robert Tredgold* in the character of executor, it does not prove the issue. The present case is therefore distinguishable from *Whitcomb v. Whiting*; beyond which I think the Court ought not to go. The rule must, therefore, be discharged.

Rule discharged.

(a) See *Thomson v. Tickell*, 3 B. & A. 38., and *Bonifant v. Greenfield*, 1 Leon. 60. Cro. Eliz. 80.

Ex parte HAWKINS.

Wednesday,
June 4th.

THE prisoner was brought up on a writ of habeas corpus. The return set out a conviction in the following form: "Be it remembered, that on, &c. *C. Hawkins* hath been duly convicted before me, &c. of having been found and taken on board a certain vessel, subject and liable to forfeiture under the provisions of a certain act of parliament made and passed, &c.; for that the said vessel was on, &c. found *hovering* within the limits of a port of this kingdom, to wit, the port of *Rye*, in the county of *Sussex*, and then and there having

Where a conviction stated that "*C. H.* was convicted of having been found on board a vessel subject to forfeiture, for hovering within the limits of a port of this kingdom, having certain contraband goods on board:" Held, that this was bad. First, for that it should have

been stated that the vessel was hovering without lawful excuse. Secondly, for that *C. H.* should have been described as a *British* subject.

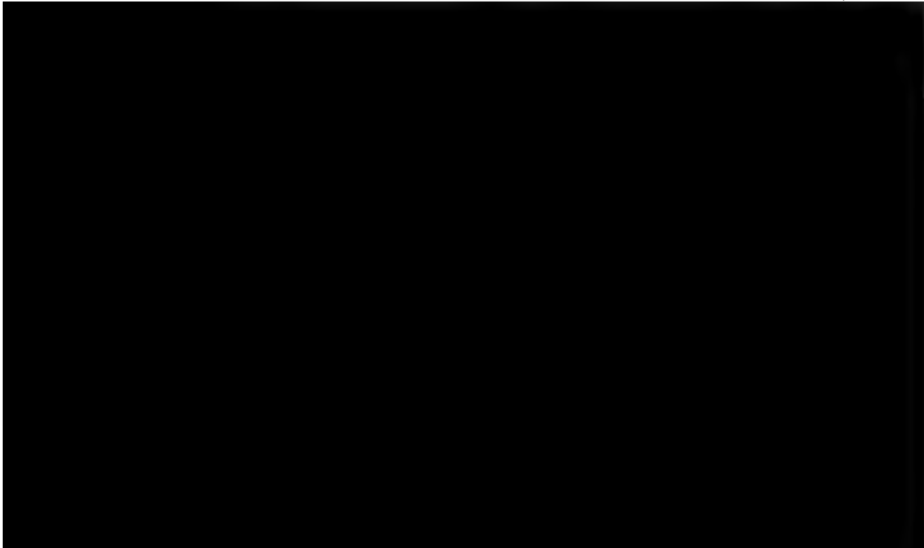
on

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Ex parte
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on board, &c. (various contraband articles); which offence hath been duly proved, &c. And the said *C. Hawkins* being a seafaring man, and fit and able to serve his majesty in his navy, I do hereby adjudge the said *C. Hawkins* to serve in his majesty's naval service," &c. The return having been read, *Platt* moved that the prisoner might be discharged, because it did not appear on the face of the conviction that the vessel was liable to forfeiture; and, secondly, because it was not alleged that *Hawkins* was a *British* subject.

Jervis shewed cause. The conviction does shew that the vessel was liable to forfeiture, for it states that she was found hovering within the limits of a port of this kingdom. By the 24 G. 3. c. 47. s. 1. it is enacted, "That if any ship or vessel shall be found at anchor or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, or shall be discovered to have been within the said limits or distance, (and not proceeding on her voyage, wind and weather permitting, unless in case of unavoidable necessity and distress of weather,) having on board any brandy, &c., or any goods liable to forfeiture by



found or discovered to have on board any ship or vessel liable to forfeiture under the provisions of that or any other act for *hovering*, unless they prove that they were passengers; and the 3 G. 4. c. 110. gives a general form of conviction, which has been followed in this case, and which does not require that the offender should be described as a *British* subject.

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HAWKINS.

Platt, contra. The words “not proceeding on her voyage,” being in a parenthesis, must apply to all the preceding parts of the section; and it is reasonable that they should do so, for a vessel may hover legally and with the intent to proceed on her voyage as soon as the wind or tide will permit. According to the construction contended for on the other side, a vessel cannot lie to for any purpose, however innocent, without being liable to forfeiture. Then, as to the second objection, it is true that the 3 G. 4. c. 110. gives a general form of conviction; but that requires the offence to be set out, and the allegation that the party was a *British* subject, is part of the description of the offence; for unless he be such subject he is not within the operation of the 45 G. 3. c. 121. s. 7. *Kite* and *Lane’s* case (a) shews that the general form of conviction does not dispense with the necessity of stating these matters correctly.

Per Curiam. The offence is not sufficiently described in the conviction, for it does not appear that the vessel was liable to forfeiture. It is merely stated that the vessel was found hovering with certain goods on board. But a vessel may be hovering, and still not be liable to

(a) 1 B. & C. 101.

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forfeiture. It would be putting too narrow a construction on the act to confine the application of the words "not proceeding on her voyage" to those vessels which have been within a certain distance of the coast; for if that were so, vessels hovering for a pilot, or for any other innocent purpose, might be subjected to forfeiture. The hovering contemplated by the legislature is, hovering with power to proceed, and without any sufficient cause for not doing so. The conviction is bad upon another ground also, viz. that the party is not described as a *British* subject. If he were not so, the thing charged against him would not constitute an offence within the 45 G. 3. c. 121. s. 7., or render him liable to punishment. Every thing necessary to shew that an offence has been committed must be stated in a conviction; the allegation of his being a *British* subject was, therefore, essential to the description of the offence, and that must be correctly stated, notwithstanding the general form given by the 3 G. 4. c. 110. The prisoner must, therefore, be discharged.

Prisoner discharged. (a)

(a) Bayley J. had left the court.

year; and were on the same day sworn and admitted 1823.
 into their respective offices. They all neglected to re- In the Matter
 ceive the sacrament, and take the oath of allegiance, &c. of STEAVENSON.
 within six months, as required by the 25 *Car. 2. c. 2.*,
 16 *G. 2. c. 30.*, 1 *G. 1. st. 2. c. 13.*, and 9 *G. 2. c. 26.*
 It will be urged that they are protected by the last an-
 nual indemnity act. (a) But that act passed on the 27th
 of

(a) The 4 *G. 4. c. 1.*, intituled "An act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices, employments, and for extending the time limited for those purposes respectively until the 25th day of *March*, 1824." The preamble recites that divers persons required to take certain oaths, and do certain other acts by certain statutes therein recited, have, "through ignorance of the law, absence, or some unavoidable accident, omitted to take and subscribe the said oaths, &c., within such time and in such manner as in and by the said acts respectively, or by any other act of parliament in that behalf made, is required, whereby they have incurred, or may be in danger of incurring, divers penalties and disabilities;" and then it proceeds to enact, "that all and every person and persons who, at or before the passing of this act, hath or shall have omitted to take and subscribe the said oaths, &c., within such time, and in such manner as in and by the said acts or any of them, or by any other act of parliament in that behalf made, is required, and who, after accepting any such office, &c. before the passing of this act, hath or have taken and subscribed the said oaths, &c., or who on or before the 25th day of *March*, 1824, shall take and subscribe the said oaths, &c., shall be and are hereby indemnified, freed, and discharged from and against all penalties and disabilities incurred, or to be incurred, for or by reason of any neglect or omission, previous to the passing of this act, of taking or subscribing the said oaths or assurance, or receiving the sacrament, or making or subscribing the said declaration, or taking or subscribing the said oath according to the above-mentioned acts or any of them, or any other act or acts; and such person or persons is and are, and shall be fully and actually recapacitated and restored to the same state and condition as he, she, or they were in before such neglect or omission, and shall be deemed and adjudged to have duly qualified him, her, or themselves, according to the above-mentioned acts and every of them; and that all elections of, and acts done or to be done by any such person or persons, or by authority derived from him, her, or them, are and shall be of the same force and validity, as the same or any of them would have been, if such person or persons respectively had taken the said oaths

1823. of *February* last, and only applies to those who "at or before the passing of the act," had incurred penalties or disabilities. These persons being elected on the 29th of *September*, had not incurred any penalty or disability when the indemnity act passed, and cannot therefore be protected by it.

—
In the *Matter*
of *STRAVENSON*.

Campbell shewed cause in the first instance. The object of the indemnity act was to enlarge the time before allowed for receiving the sacrament, taking the oath, &c. required of persons accepting certain offices and employments. The preamble of the statute certainly appears to be limited to such persons as had made default before the act passed, but is capable of receiving a larger construction. The title is material, to shew a different intention in the legislature: that is, "An act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and for extending the time limited for those purposes respectively." The enacting part too extends to all those who, at or before the passing of the act, *have* or *shall have* omitted, &c. That certainly is future as well as past, and must extend to all that are in

Per Curiam. There may perhaps be some obscurity in the words of this statute, but there is none in its title. It was manifestly the intention of the legislature to extend the time for taking the oaths and performing the other acts required of persons filling certain offices; and this being a remedial statute, we should so construe it as to give full effect to that intention.

1823.

In the Matter
of STRAVENSON.

Rule refused.

BALDEY and Another *against* PARKER.Thursday,
June 5th.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before *Abbott C. J.* at the *London* sittings after *Trinity* term 1822, the following appeared to be the facts of the case. The plaintiffs are linendrapers, and the defendant came to their shop and bargained for various articles. A separate price was agreed upon for each, and no one article was of the value of 10*l.* Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods was 70*l.* The defendant looked at the account, and asked what discount would be allowed for ready money, and was told 5*l.* per cent.; he replied that it was too little, and requested to see the person of whom he bought the

A. went to the shop of *B.* and Co., linendrapers, and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon; some *A.* marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together

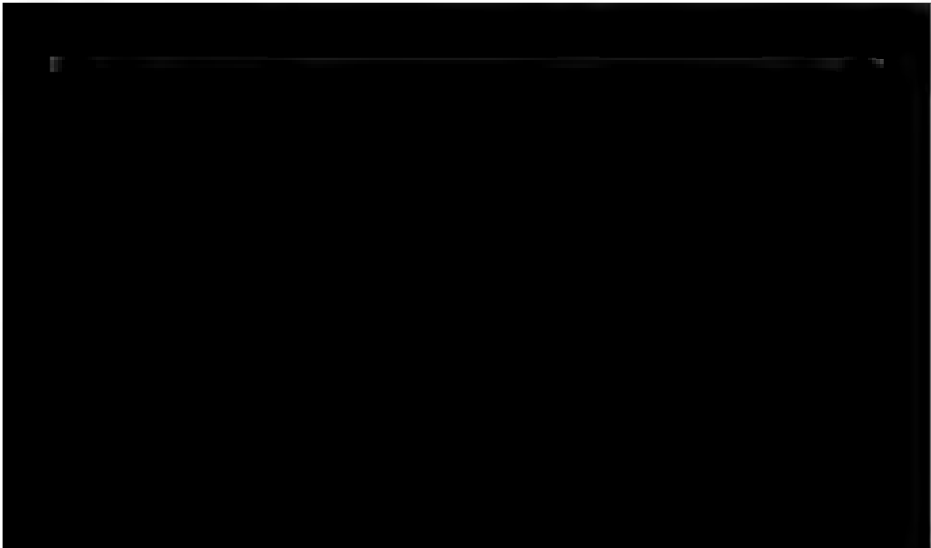
with the goods, when *A.* refused to accept them: Held, first, that this was all one contract, and therefore within 29 *Car. 2. c. 5. s. 17.* Secondly, that there was no delivery and acceptance of any of the goods so as to take the case out of the operation of that section.

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**BALDEY
against
PARKER.**

goods, (*Baldey*) as he could bargain with him respecting the discount, and said that he ought to be allowed 20l. per cent. The goods were afterwards sent to the defendant's house, and he refused to accept them. The Lord Chief Justice thought that this was a contract for goods of more than the value of 10l. within the meaning of the seventeenth section of the statute of frauds, and not within any of the exceptions there mentioned, and directed a nonsuit; but gave the plaintiffs leave to move to enter a verdict in their favour for 70l. A rule having accordingly been obtained for that purpose,

Scarlett and *E. Lawes* now shewed cause. It is quite clear that this was an entire contract for the whole of the goods. Suppose after the bargain for them all was made, the plaintiffs had refused to let the defendant have some one particular article, they could not have compelled him to take the residue; or if one of the articles when sent home differed from that bargained for, the purchaser might have rejected the whole, for no jury would ever have found that there were separate contracts, and have compelled him to take that part which corresponded with the order. Then as to the supposed



if that were not so, the defendant accepted the goods, so as to take the case out of the statute of frauds. Whether the contracts were several or not, cannot depend upon the time when the various articles were purchased, but upon what passed at the making of the bargain. Now it was distinctly proved that a separate price was fixed upon each article, and the purchase of each was complete before the parties went on to bargain for any others. If that be not so, it will be difficult to determine what space of time must elapse between the purchase of any two articles, in order to make the contracts separate. In *Emmerson v. Heelis* (a), it was held that the purchaser of several lots at an auction was to be considered as making a separate contract for each lot. Had the defendant left the shop for a few minutes between the purchase of each article, that certainly would have made them separate contracts, and there does not appear to be any substantial difference between such a case and the present. Then as to the second point, there was a complete delivery and acceptance within the meaning of the statute. There was a complete change in the state of the property. The defendant assisted in measuring the articles, and in severing them from the bulk; the price of each was fixed; so that nothing remained to be done before they were to be delivered to the defendant. The change of property was therefore complete. *Rugg v. Minett*. (b) Some the defendant actually marked with a pencil; and in *Hodgson v. Le Bret* (c), that was considered as an acceptance. So also was cutting off the pegs in pipes of wine. *Ander-*

1823.

 BALDEY
 against
 PARKER.

(a) 2 Taunt. 38.

(b) 11 East, 210.

(c) 1 Campb. 253.

1823.

BALDWIN
against
FARMER.

son v. Scott (a) The policy of the statute of frauds was, that a mere verbal agreement should not bind; but it does not apply where any act has been done to shew the approval of the contract. *Chaplin v. Rogers*. (b) *Elmore v. Stone*. (c) *Searle and Others v. Keeves*. (d) [*Holroyd J. Hanson v. Armitage* (e), and *Carter v. Trousaint* (f), are strong authorities against you.] In the former the purchaser had not exercised any judgment on the article ordered, and in the latter the firing of the horse was the act of both parties, and not done to shew an approval of the contract. Neither does *Howe v. Palmer* (g) apply, for the goods were covered by the vender alone. With respect to the vender's right of lien, that has never been decided to be the criterion by which cases of this nature are to be judged of. Indeed lien imports that the property has passed. [*Holroyd J.* If the property has passed subject to a lien, is that a delivery and acceptance within the meaning of the statute?]

ABBOTT C. J. We have given our opinion upon more than one occasion, that the 29 Car. 2. c. 3. is a highly beneficial and remedial statute. We are there-

first question is, whether this was one entire contract for the sale of all the goods. By holding that it was not, we should entirely defeat the object of the statute. For then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. The plaintiffs therefore cannot maintain this action unless they can shew that the case is within the exception of the 29 Car. 2. c. 3. s. 17. Now the words of that exception are peculiar, "except the buyer shall accept part of the goods so sold, and actually receive the same." It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and leave the vendor to this action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.

BAYLEY J. The buyer cannot be considered to have actually received the goods, when they have remained from first to last in the possession of the seller. The plaintiffs are not assisted by the exception in the seventeenth section of the statute of frauds. Then the question is, whether there was a separate contract for each article. The 29 Car. 2. c. 3. was passed to guard
against

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against
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against
PARKER.

against frauds and perjuries; and it must be collected from the seventeenth section, that the legislature thought that a contract to the extent of 10*l.* might be sufficient to induce the parties to it to bring tainted evidence into court. Now it is conceded here, that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10*l.* Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l.* within the seventeenth section of the statute; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law. It has been asked, what interval of time must elapse between the purchase of different articles in order to make the contract separate, and the case has been put of a purchaser leaving a shop after making one purchase and returning after an interval of five or ten minutes, and making another. If the return to the shop were soon enough to warrant a supposition that the whole was intended to be one transaction, I should hold it one entire contract within the meaning of the statute. I am

ture contract within the meaning and mischief of the statute of frauds, it being the intention of that statute that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of 10*l*. it should not bind unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l*. as if it had been originally of that amount. It must therefore be considered as one contract within the meaning of the act. With respect to the exception in the seventeenth section, it may perhaps have been the intention of the legislature, to guard against mistake, where the parties mean honestly as well as against wilful fraud; and the things required to be done will have the effect of answering both those ends. The words are, "except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." Each of those particulars either shews the bargain to be complete, or still further, that it has been actually in part performed. The change of possession does not in ordinary cases take place until the completion of the bargain: part payment also shews the completion of it; and in like manner a note or memorandum in writing signed by the parties plainly proves that they understood the terms upon which they were dealing, and meant finally to bind themselves by the contract therein stated. In the present case there is nothing to shew that some further arrangement might not remain unsettled after the price
for

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for each article had been agreed upon. There was neither note nor memorandum in writing; no part of the price was paid, nor was there any such change of possession as that contemplated by the statute. Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.

Barr J. It was formerly considered that a delivery of the goods by the seller was sufficient to take a case out of the seventeenth section of the statute of frauds; but it is now clearly settled, that there must be an acceptance by the buyer, as well as a delivery by the seller. The statute enacts, that where the bargain is for something to the value of 10*l.* it shall not bind, unless something unequivocal has been done to shew that the contract is complete. Nothing of that kind having been done in this case, if the dealing is to be considered as one entire transaction, it is clear that the plaintiffs



1823.

WHITELEGG against RICHARDS. (a)Saturday,
June 7th.

THIS was a writ of error, upon a judgment given in the Court of Common Pleas, on demurrer to a declaration. The substance of the pleadings is stated in the judgment delivered by the Court. The case was now argued by

Campbell, for the plaintiff in error. The substance of the complaint in the declaration is, that the defendant being an officer of the court for the relief of insolvent debtors, and maliciously intending to cause the debtor detained in custody at the suit of the plaintiff to be discharged, issued an order for his discharge, whereby the plaintiff lost all means of recovering his debt. The issuing of that order was a wrongful act by the defendant, and the plaintiff has sustained a temporal damage by losing the body of his debtor, which, according to *Buller J.*, he had a right to keep every hour till the debt is paid. *Plank v. Anderson. (b)* In *Com. Dig. tit. Action upon the Case for Deceit, (A 6.)*, it is laid down, "that such action will lie if an officer, being entrusted by the law, act *deceptive* in his office;" or, if the escheator return a writ directed to him, without

Declaration stated that the defendant, being the clerk of the court for the relief of insolvent debtors, wrongfully and maliciously intending to injure the plaintiff, and to cause one *S. C.*, in custody at the suit of the plaintiff, to be discharged out of custody without paying plaintiff his damages and costs, wrongfully and unlawfully issued an order, purporting to be an order from that court, and purporting that the prisoner should be discharged from custody; whereas in truth and in fact, the court did not pronounce any such order, nor give any authority to the defendant to

issue the same, by reason whereof the prisoner was discharged from custody: Held, upon error, brought upon a judgment of C. P., given for defendant upon demurrer to the declaration, that it was not necessary to aver that the order had been set aside by the court; for the order was to be considered the act of the officer, and not of the court.

(a) See the first count of the declaration set out at length in 3 *Brod. & Bing.* 188.

(b) 5 *Term Rep.* 37.

making

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making an inquest, though he be an officer of record. "So, if the under escheator make a return different from the office found by the escheator." And in tit. *Action upon the Case for Misfeasance*, (A 1.), it is laid down, "that an action upon the case lies against an officer for a misfeasance, as if an officer misdemean himself by any falsity." "So, if a prothonotary of C. B. award a supersedeas irregularly to process, upon which A. is arrested at the suit of another." And *Lutwyck*, 96. is referred to. That was an action by Sir *Edward Smith, Bart., v. Winford*, the prothonotary, for issuing a writ of supersedeas, in consequence of which one E. A., whom the plaintiff had caused to be arrested, was discharged, without bail, or any appearance being entered with the filazer. The declaration in the present case follows precisely the precedent to be found in *Lutwyck*. The declaration there did not contain any avowment that the supersedeas was set aside for irregularity. It is true, that in that case the plaintiff was nonsuited, for not entering the issue in due time; and, therefore, the question, whether the action was maintainable, could not have arisen, either upon motion in arrest of judgment or in error. Lord Chief Baron

approbation by Lord Chief Baron *Comyns*, in his *Digest*, tit. *Action upon the Case for Negligence*, (A 2.) ; and in the same title he lays it down in the words used by Lord *Holt*, in *Ashby v. White* (a), that in every case where an officer is entrusted by the common law or by statute, an action lies against him for a neglect of the duty of his office. In *Douglas v. Yallop* (b), Lord *Mansfield* intimates an opinion, that an action on the case would lie against the chief clerk of this court for not entering a judgment, after he had received his fees for so doing, by a purchaser who should have become liable to it, and had searched the roll without finding it entered up. The material distinction in such cases is between ministerial and judicial offices. In *Schinotti v. Bumsted* (c), an action was held to be maintainable against the commissioners of the lottery for withholding a prize against the person entitled to receive it ; and in that case malice was not alleged. In *Harman v. Tappenden* (d) it was held, that an action would not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happened to the plaintiff ; but *Lawrence J.* there intimated an opinion that the action might have been maintained if it had been proved that the defendants, intending to injure the plaintiff, had wilfully and maliciously done the act complained of. *Drewe v. Coulton* (e) and *Milward v. Sergeant* (f) are authorities to shew that an allegation that the defendant, “ knowing, &c., and wrongfully intending to injure the plaintiff,” amounts to an allegation of malice. But, in the present case malice is expressly alleged.

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WHITELEGG
against
RICHARDS.

(a) *Salk.* 18.(c) 6 *T. R.* 646.(e) 1 *East*, 563.(b) 2 *Burr.* 722.(d) 1 *East*, 561.(f) *Ib.* 567.

It

1823.

WHEELER
: against
RICHARDS.

It was contended in the court below, that the plaintiff had sustained no damage, inasmuch as he could have no interest in his debtor's detention, when, in pursuance of the act, he had assigned all his present and future effects to his creditors. The imprisonment of the debtor is considered in law as a satisfaction to the creditor. The debtor still remained in custody in execution at the suit of the plaintiff. For the 1 G. 4. c. 119. s. 18. enacts, "that in the cases therein mentioned, the debtor is not to be discharged until he shall have been in custody at the suit of the creditor, for any period not exceeding two years." Under this section the court ordered the debtor to be confined two years. This objection does not apply to the last count. (a) The proceedings in the insolvent debtor's court are not there mentioned. Besides, an action will lie against a sheriff, for the escape of a person arrested upon an excommunicato capiendo issued in a writ for non-payment of tithes, *Slipper v. Mason* (b); or of a person in custody upon a capias utlagatum after outlawry upon meane process, *Cooke v. Champneys* (c); or

(a) That count charged that the defendant was a clerk of the court, &c., and that S. C. was in custody of the keeper of Lancaster gaol for certain

of one committed by commissioners of bankrupt for refusing to answer interrogatories. *Barnes v. Carey.* (a) In all these cases the party was in custody for the contempt, yet the action was held to be maintainable by the plaintiffs in the original suits.

1828.

 WRITABLES
 against
 RICHARDS.

The court below pronounced judgment in favour of the defendant, on the ground that the order mentioned in the declaration was to be considered the act of the court. It is, however, expressly averred, not only that the defendant made the order without any authority from the court; but that, in truth and in fact, the court did not at any time pronounce any such order. The word "order" means only a paper in the form of an order. It is not an act of the court; it is delivered out by the officer. In actions, indeed, between third persons, the order, signed by the proper officer of the court, may be *prima facie* evidence of an act done by the court; yet, in an action against the officer himself for wrongfully making such an order, it cannot be competent to him who has wrongfully made the order to say that it is the order of the court. It might have been contended, if the case had gone to trial, that the only admissible evidence to shew that the order was not the order of the court, was the rule to set it aside, but non constat that such rule might not have been produced if the case had gone to trial. It cannot be necessary to set out the evidence in the declaration. Besides, suppose the order to have been issued the last day of the five years for which the court was established by the act of parliament, no application in that case could have been made

(a) *Moore*, 834. 1 *Rolle's Rep.* 47. 2 *Bulstr.* 236.

1823.

WATKINS
against
RICHARDS.

to set it aside; yet surely an action for maliciously issuing it would have been maintainable. An action will lie for maliciously suing out a writ, although the writ be not set aside; yet the writ itself, in that case, will be a justification to the gaoler for detaining the party in custody; à fortiori, an action for maliciously issuing such writ will lie against an officer of the court, whose peculiar duty it is not to abuse its process.

Telford, contra. The general principle may be conceded, that an action is maintainable against an officer of a court, for maliciously issuing, without authority, a paper purporting to be an order of the court. It may also be conceded, that a sufficient damage is alleged (especially in the last count) to maintain the action. But the judgment of the court below may be supported, upon the ground that the order, upon the face of the declaration must be considered the act of the court. It is alleged that the defendant was a clerk and an officer of the court; and that it was his duty, as such officer, to issue an order of that court, ordering that the prisoner should be discharged. The moment such order was signed and issued by him, it became the act of the

sets up that supposed intention against the order which is the act of the court.

1828.

WHITELEGG
against
RICHARDS.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court.


This case was argued before us in the course of the present term. It is a writ of error brought on a judgment given in the Court of Common Pleas in an action on the case. The judgment of that court was in favour of the defendant in the action, and the plaintiff below is also the plaintiff in error. The declaration alleges in substance, that the defendant was the clerk of the court for the relief of insolvent debtors; and that being such clerk, and wrongfully and maliciously intending to injure the plaintiff, and to cause one *Chorlton*, who was in custody at the suit of the plaintiff, to be forthwith discharged out of custody without paying the plaintiff his damages and costs, and to deprive the plaintiff of the means of recovering the same, wrongfully and unlawfully wrote, made out, and issued an order, purporting to be an order from the court for the relief of insolvent debtors, entitled, "In the matter of the petition of *Strettell Chorlton*," and directed to the gaoler of *Lancaster*, and purporting thereby that the said court did order that the prisoner should be discharged from custody, as to the plaintiff, at whose suit he was detained; whereas in truth, and in fact, the said court did not pronounce any such order, nor give any authority to the defendant to write, make out, or issue the same. By means whereof, the said order being exhibited to the gaoler, *Chorlton* was discharged from custody against the will of the plaintiff, the debt and damages being

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unsatisfied, by means whereof the plaintiff has been greatly injured, and lost all means of enforcing payment from *Chorlton*. This may be taken as the substance of all the counts of the declaration; but it further appears by some of them, with more or less particularity, that *Chorlton* had been brought up before the justices at the quarter sessions at *Lancaster*, and had been by them adjudged to remain in actual custody for two years at the suit of the plaintiff, before he should be discharged from custody by virtue of the act.

On the argument before us, some authorities were quoted to shew, that an action upon the case may be maintained against an officer of a court for a falsity or misconduct in his office, whereby a party sustains a special damage; and that, in this case, a damage was plainly shewn by the loss of the means of enforcing payment from the debtor, as in actions against sheriffs or gaolers for an escape.

It is not necessary to repeat the authorities quoted. The general principle was not controverted. But on the part of the defendant, it was insisted that the order mentioned in the declaration must, upon this declaration, be understood to be the act of the court, although the



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question must be understood and taken not to be the act or order of the court. The intention of the defendant in writing, making out, and issuing this instrument, is charged to have been wrongful and malicious. The act of writing, making out, and issuing, is charged to have been wrongful and unlawful; and there is a positive and formal averment, not only that the court did not pronounce any such order, but also, that the court did not give any authority to the defendant to write, make out, or issue the same. Whether these allegations can or cannot be proved, is quite a distinct matter, and a matter with which we have at present no concern. It is true that the instrument is called an order, purporting to be an order of the court, and purporting that the court did order the discharge of *Chorlton*; but looking at the whole declaration, and advert-
ing to the other allegations that have been noticed, we think the word "order," as here used, must be understood to denote the *form* only of the instrument. Thus, the statute against forgery, 45 G. 3. c. 89., mentions the forging of any will, testament, bond, warrant, or order, for payment of money, bank note, bank bill of exchange, and many other instruments. And the legislature must in this statute, as in many others that have passed on the same subject, be understood in mentioning these instruments, to speak of them as being such in *form* only, for a forged instrument cannot be, *in fact*, a testament, bond, warrant, order, or bank note, and all this is conformable to the common language and understanding of mankind. For this reason we are of opinion that the judgment ought to be reversed.

Judgment reversed.

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Monday,
June 9th.

The KING against JOLIFFE.

A regular usage for twenty years, unexp'ained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. A custom for the steward of a court leet to nominate certain persons to the bailiff, to be summoned on the jury, is a good custom.

QUO warranto, calling upon the defendant to shew upon what authority he claimed to exercise the office of mayor of the borough of *Petersfield*. Plea, that *Petersfield* is an ancient borough; and that from time immemorial, there hath been a court leet or view of frankpledge holden in and for the borough, on, &c.; and that the jury sworn and serving at that court, have presented a fit person to be mayor of the borough for one whole year; and that the person so presented, hath always been sworn in at that court before the steward, and being so presented and sworn, hath executed the office of mayor for one year; that, at the court leet duly holden on, &c. certain persons, (naming them,) good and lawful men, &c. were then and there duly sworn, as and for the jury, then and there to serve as the jury, and did serve as the jury at the said court; and being so sworn, and so serving, presented defendant to be mayor; and that he being so presented, was duly

whereas, by the law of the land, the steward should have issued his precept to the bailiff to summon a jury, and the particular persons should have been selected by the bailiff. Rejoinder, that from time immemorial the steward has been used to nominate the jurors. Issue thereon. At the trial before *Burrough J.*, at the last Summer assizes for the county of *Hampshire*, the defendant proved, that for more than twenty years the precept to the bailiff had always contained a list of persons whom the steward directed him to summon as jurors. No evidence was given for the crown to shew that any other practice had ever prevailed in the borough. The learned Judge told the jury, that slight evidence, if uncontradicted, became cogent proof; and they found a verdict for the defendant. In *Michaelmas* term *Pell Serjt.* obtained a rule nisi for a new trial, on the ground that there was not sufficient evidence to warrant the finding of the jury; or to enter judgment for the crown, *non obstante veredicto*, on the ground that the custom set out in the rejoinder was bad in law.

Scarlett, Adam, C. F. Williams, and Mereweather, shewed cause. The evidence was quite sufficient to warrant the finding of the jury. The commencement of the practice was not shewn; and therefore, in the absence of any proof to the contrary, it must be presumed that the custom, which had existed for more than twenty years, had existed from time immemorial. Indeed, all the evidence being for the defendant, a verdict for the crown must have been wrong. As to the second point, it is only necessary to advert to the nature of the court leet, in order to shew that there is no ground for this application. The court leet is derived from the

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sheriff's tourn, and its jurisdiction is the same. (a) In the tourn the sheriff is judge, and nominates the jury; in the leet the steward is in the place of the sheriff; why then should he not exercise the same power? At common law, all resiants were bound to attend the court without summons; and when they were assembled, the sheriff nominated a jury. If in order to secure a sufficient attendance, he sent his bailiff to summon the resiants, there was nothing illegal in that; and he might select the jury from those summoned. In the leet the rules were the same; and the steward, in case of a deficiency, might even swear on the jury a stranger happening to be present. (b) Suppose, instead of desiring the bailiff to summon certain persons, he had ordered him to summon all resiants; when they came, the steward certainly would be the proper person to nominate the jury. Indeed the law does not recognize a sheriff's bailiff, but considers all the acts of the latter as done by the sheriff himself. In many instances besides the tourn, the sheriff nominates the jury and presides as judge; as in writs of re-disseisin and writs of inquiry. In this particular case the steward was manifestly more independent than the bailiff, for the latter is annually elected

Pell Serjt., Gaselee, Coltman, and Carter, contra. It was incumbent on the defendant at the trial to prove, that a custom for the steward to nominate the jury had existed from time immemorial. The mere practice for twenty years past was insufficient to raise such a presumption, or to justify the opinion expressed by the learned Judge, that such evidence upon such an issue was cogent proof. But whatever may be the opinion of the Court upon that point, the custom itself is unreasonable and bad. The 1 R. S. c. 4. shews that the bailiff is the proper officer to appoint the jury, for it imposes a penalty upon him for *returning* improper persons. Now he could have no power over the return if merely a summoning officer. The 11 H. 4. c. 9. does not in terms apply to courts leet, but it does in principle; and enacts, that the bailiffs of franchises are to return the inquest, without the nomination of any. [*Holroyd J.* That act does not take away from any the authority which they had before.] The precedent given by *Scruggs C. J.* for a precept to the bailiff for assembling the court, shews that the bailiff is the proper person to select the jury. (a) [*Abbott C. J.* All your argument proceeds upon this ground, that because the thing may be done in one way, it cannot be done in any other.] If the nature and jurisdiction of the court leet are considered, it will be found that the bailiff not only *may*, but *must* select the jury. At common law it had jurisdiction over all capital offences except homicide; and although that power has been restrained by *Mag. Car. c. 17.*, and *Weston, 2. c. 13.*, still, if the custom here set up be good now, it must have been good before the

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(a) See *Scriven on Copyhold Tenures, &c.* vol. ii. p. 839.

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passing of those statutes. But it cannot be reasonable that the judge of a criminal court having such ample jurisdiction, should have the power to select the jury and decide upon the challenges. [Abbott C. J. The leet jury is rather in the nature of a grand jury.] Still the argument applies, unless it be supposed that in former times the grand and traverse juries were returned by different persons. There could be no challenge to the array, for that can only be on the ground of un-indifferency in the returning officer. Such is the consequence of the sheriff being judge in re-disseisin. *Fitz. Nat. Brev.* 188. n. That the bailiff is the proper officer also appears from the prior of *Montague's case* (a), recognised in *Roll's Abr.* (b), and *Brook's Abr.* (c), where the charge against the defendant (a bailiff) was, not that *by custom* he was bound to return the panel, but that he was the proper common-law officer to perform that duty, and had neglected it; and in *Hawk. P. C.* (d) it is said, that the sheriff may fine the bailiff for refusing to make a panel, which would be absurd, if the bailiff were not the proper person to execute that duty. The only instances in which power is given to a judge to interfere with the nomination of a jury, are by 3 H. 8. c. 12.,

who is entitled to all fines and amercements. In *Wood v. Lovatt* (a) it was decided, that a custom for the court leet to amerce for a private inquiry done to the lord was bad, for that would make him judge in his own case. Here, the steward presides in the place of the lord; and if he could select the jury who are to make presentments and impose amercements, the lord, being entitled to them, would virtually be judge in his own case. A custom producing that effect is therefore unreasonable and void.

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ABBOTT C. J. I am of opinion that this rule must be discharged. There is not any ground for a new trial. Upon the evidence given, uncontradicted, and unexplained, I think the learned Judge did right in telling the jury that it was cogent evidence, upon which they might find the issue in the affirmative. If his expression had gone even beyond that, and had recommended them to find such a verdict, I should have thought that the recommendation was fit and proper. A regular usage for 20 years, not explained or contradicted, is that upon which many private and public rights are held, there being nothing in the usage to contravene the public policy. Taking, therefore, the issue to be properly found, we must consider that by the immemorial custom of this court leet the steward has been in the habit of pointing out to the bailiff the persons who are to be summoned on the jury. If that custom be against any known rule or principle of law, it cannot stand, however great its antiquity may be. But I am of opinion that it is not; and I adopt in a great degree what has been said respecting the ancient con-

(a) 6 T. R. 511.

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stitution and practice of the tourn and leet. All residents were bound to attend, and many did attend; and not till they were assembled was any jury selected. Then the sheriff in the one case, and the steward in the other, named to his officer the persons who were to be impanelled, and to serve on the jury. If it were the ancient practice to select a jury in that mode without summons, there does not appear to be any sound reason why certain persons should not be summoned to serve as jurors. Various acts of parliament have been referred to, as shewing something inconsistent with this. The first of them is 11 *H.* 4. c. 9. By that it appears that a practice had crept in for other persons than the sheriff or bailiff of a franchise to nominate to the judges those who should serve on the grand juries, which was found very mischievous. It was therefore provided by that act, that none should serve but those who were returned to the judges by the sheriff or bailiff, without the nomination of any other person. Then came the 1 *R.* 3. c. 4. whereby it was enacted in *sec.* 1. "that if the bailiff should return or impanel to serve as jurors in the tourn any persons not having the qualification there mentioned, he should forfeit 40s.; and by *sec.* 2. a similar fine is

The case of *Crane v. Holland*, which has been cited, also shews that the same person may, *by custom*, be the judge of a court for one purpose, and the officer for another. But a passage in *Hawk, P. C. b. 2. c. 10. s. 15.* has been relied upon as shewing that the bailiff is to select the jury, because the sheriff may fine him for not making a panel. But there is nothing inconsistent in saying that it is the bailiff's duty to make the panel, although the sheriff decides upon the persons to be named in it. There is also another answer to the argument, viz. that the passage may refer to the traverse jury, and not the grand inquest. In other cases, as in writs of inquiry and re-disseisin, the sheriff nominates the jury, and presides as judge: can we then say that there is any thing in the custom now under consideration, which is at variance with any known rule or principle of law? The usual mode may be different, but that is the whole argument; and to infer thence that no other mode can be legal, is not consistent either with good logic, or good law. Upon the whole, therefore, I am of opinion that there is nothing unreasonable or illegal in this custom, which has been established by the verdict, and that the judgment ought not to be entered for the crown.

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HOLROYD J. (a) I am of opinion that the observations of the learned Judge, and the verdict of the jury, were well warranted by the evidence in the cause. The remaining question is, whether the custom found be contrary to law, and therefore void. The common and ordinary course is for the bailiff to nominate the jury;

(a) Bayley J. had left the court.

and,

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and, in the absence of any custom to the contrary, that would be held to be a part of his duty. But here it is found that a custom has immemorially existed for the steward, and not the bailiff, to nominate the jury. It appears to me that the authorities which have been cited, and the usage which has prevailed on writs of inquiry, and in some other instances, establish clearly that the custom is not inconsistent with any principle of law. The statute 3 H. 8. c. 12. giving judges the power to amend panels, shews that the legislature did not think it against the principles of law, that judges should interfere with the nomination of the persons who were to serve. Unless then some act of parliament can be found depriving the steward of such a privilege as that now claimed, it is plain that he may enjoy it. The 11 H. 4. c. 9. is the only one that at all bears upon the question; but that was intended to remedy the abuse which had been introduced of nominations by persons without any authority, and was not meant to apply to such cases as this. The latter part of it runs thus: "And that from henceforth no indictment be made by any such persons but by inquest of the king's lawful liege people, in the manner as was used in the time of his noble progenitors,

case of *Crane v. Holland* is, I think, decisive of the principle; for it is there held that one may be judge and officer, *diversis respectibus*. For these reasons, I am of opinion that the rule must be discharged.

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BEST J. We are not called upon to lay down any general rule in this case, but merely to say whether the special immemorial custom found by the jury be or be not consistent with the principles of law. No direct authority has been cited to shew that the custom is bad. The form given by *Scroggs C. J.*, by which it appears that the bailiff usually selects the jury, may prove what the general practice is, but does not impugn the custom. The only other case cited at the bar, *Crane v. Holland*, is in support of the custom. It was there held, that in a corporation the bailiffs might *by custom* be both judges and ministerial officers of the court. An attempt was made to shew that this case differed from that and the cases where the sheriff presides as judge, because here the lord is entitled to the fines and amercements; but that argument, if valid, would also shew that the sheriff cannot properly select the jury in such cases, because he is appointed by the crown, to which the fines imposed in his court belong. So also in corporations, the fines for the most part belong to the body corporate, and yet the mayor and the corporation sit as judges in the corporate courts and impose fines. Of the statutes which have been referred to, one only appears to touch the question, and that furnishes an answer to this application. It is true that the 11 *H. 4. c. 9.* says, that jurors in indictments shall be returned by the *sheriff* or *bailiffs*, because these are the officers whose duty it is in general to return them; but
this

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this statute was not intended to prevent any other properly authorised officer from returning jurors, but only such as were not officers of the court from nominating persons to the court to serve as jurors. The 1 R. 3. c. 4. only provides for the return of jurors who were properly qualified, and makes no regulation as to the returning officer. It speaks of bailiffs and other officers. But the 1 Eliz. c. 17., which gives the steward of a leet a power to nominate a second jury in case of misconduct in the first, warrants us in saying that a custom for the steward to nominate the first is not unreasonable or illegal. The legislature would not have directed the steward to nominate the second jury if it had considered him as so dependant on the lord who is to receive the fines imposed in the court, as not fit to be trusted to return the jury who are to impose them. This, therefore, is a complete answer to the only objection that appears to me to be even specious. If the steward be a proper person to name the second jury, he cannot be so unfit to return the first, as to make an immemorial custom, that he is to return the jury at the leet, bad in point of law.

Rule discharged.



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G. SIMSON, R. STEPHENSON, and THOMAS FREEN *Tuesday, June 10th.*
against BENJAMIN INGHAM, the Heir of one
 JOSHUA INGHAM deceased, and the said BEN-
 JAMIN INGHAM, JOSHUA INGHAM, JAMES TAY-
 LOR INGHAM, and Others, Devisees of the said
 JOSHUA INGHAM deceased.

THIS was an action against the defendants, as heirs and devisees of *Benjamin Ingham* deceased, on a bond, bearing date the 19th October; 1808; whereby *Benjamin*, and *Joshua Ingham*, since deceased, therein described as late of *Huddersfield*, bankers, became bound in the penal sum of 20,000*l.*, to one *P. C. Bruce*, and the three plaintiffs, *Simson*, *Stephenson*, and *Freen*, therein described as bankers in *London*, carrying on business under the firm of *Were Bruce, Simson, and Co.* The condition of the bond was, that *B. and J. Ingham* should well and truly remit and pay to the said *P. C. Bruce, Simson, Stephenson, and Freen*, or any of them, associated or not with any other person or persons in

A bond was given by country bankers to the several persons constituting the firm of a *London* banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the *London* bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons.


One of the partners in the country bank died, a considerable balance being then due to the *London* bankers. It was the course of business between the two houses for the *London* bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the *London* bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the *London* bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time: Held, that the entries in the books of the *London* bankers did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and therefore that the *London* bankers, notwithstanding those entries, were entitled to apply the payments received subsequently to the death of the deceased partner to the debt of the new firm.

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the same or any firm, the amount of all such sums as *B. and J. Ingham*, or either of them, associated with any other person or persons or not, should draw on the said *Bruce, Simson, Stevenson, and Freen*, or any of them, associated or not as aforesaid, or make payable at their house, as the said bills or notes should become respectively due. There then followed other clauses, usual in such bonds, for payment of all monies paid, laid out, and expended by the *London* bankers, on account of the country bankers, or due from the latter to the former, upon any account whatever.

The defendants pleaded separately, and admitted the execution of the bond by *Benjamin Ingham*, and set out the estates which they severally took under the obligor, which the plaintiffs confessed to be accurately set out. The plaintiffs suggested breaches of the condition of the bond, and the writ of enquiry came on to be executed before the Lord Chief Justice, at the *London* sittings after *Easter* term, 1822, when the amount of the damages was referred to Mr. *Gaselee*; who, by his award reciting the bond and the order of reference, assessed them at 13,845*l.*, but stated the following facts for the opinion of the Court.



called Messrs. *Benjamin and Joshua Ingham and Co.* The house of *Bruce, Simson, and Co.* was carried on by the four obligees till the 31st *December*, 1808, when *Stephenson* retired. The other three continued by themselves till the 1st *January*, 1811, when they took in *Harry Mackenzie*; and it was continued by *Bruce, Simson, Freen, and Mackenzie*, till after the death of *Joshua Ingham*. During the latter period this firm was sometimes called *Bruce, Simson, and Co.*, and sometimes *Bruce, Simson, Freen, and Co.* The house of *Bruce and Co.* were in the habit of sending to the *Huddersfield* bank monthly statements of their accounts. Such statements were generally sent within the first ten or twelve days of the succeeding month; and were, on their arrival at *Huddersfield*, examined, and the sums ticked by a clerk of that bank, and also looked over by *Ikin*, to whom the *Inghams* chiefly left the management of the business. The last statement, sent previously to the death of *Benjamin Ingham*, was for the month of *August*, 1811, and was sent on the 11th of *September*, in that year. The balance of that account was 23,671*l.* 3*s.* 2*d.* in favour of *Bruce and Co.* On the 16th *September*, when the news of *Benjamin Ingham's* death reached *Bruce and Co.*, the balance in their favour was 22,723*l.* 5*s.* 3*d.* On the 14th, the day on which *Benjamin Ingham* died, it was something less; but on the 16th had increased to the above sum by the addition of some bills for which the *Inghams* had had credit, and which were returned on that day dishonoured. No alteration in the account was made in the books of *Bruce and Co.* immediately on the death of *Benjamin Ingham*; but, during the residue of the month of *September* and a part of the month of *October*, the remit-

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tances made by the *Huddersfield* bank, and the payments made by *Bruce* and Co. on their account, were entered in continuation of the former account. The remittances and payments during that time were nearly equal, and both far exceeded the balance due at the death of *Benjamin Ingham*, and if by having thus continued the account *Bruce* and Co. are to be considered as having made an election from which they are not at liberty to depart, and bound to apply the earliest remittances in discharge of the former balance, the damages are to be only nominal. Before, however, any account was transmitted to the *Huddersfield* bank subsequent to that for August, *Bruce* and Co., in consequence of a communication with their solicitor, opened a new account in their books, and in that inserted all the remittances and payments made subsequent to the death of *Benjamin Ingham*, striking them out of the former account, and retaining in the old account only the bills for which, as before stated, credit had been given, but which had been returned dishonoured; and on the 18th November, 1811, they transmitted to the *Huddersfield* bank statements of two accounts, each of which, instead of comprising, as formerly, the transactions of a single month, contained

his was a similar list of bills returned dishonoured in *October*, which increased the balance to 23,118*l.* 13*s.* The second account was in the same form, but entitled "new account," and the word *Freen* was introduced after *Simson*. This account began on the 16th *September*, without any balance brought forward, and contained the remittances and payments made during that month, subsequent to the death of *Benjamin*, and also those made in the month of *October*. The balance of that account, at the end of *September*, was 965*l.* 15*s.* 8*d.* in favour of the *Huddersfield* bank; but at the end of *October* was 242*l.* 12*s.* 7*d.* in favour of *Bruce* and Co. These accounts were examined and ticked in the usual manner, by the clerk of the *Huddersfield* bank. From this time the old and new accounts were kept separate in the books of *Bruce* and Co.; the addition to the former being little, if any thing, more than the interest at the end of every six months, except in the month of *July*, 1813, when a transfer was made from the new account to the old of 15,507*l.* 18*s.* 10*d.*, which reduced the balance of the old to 10,000*l.* Statements of these two accounts continued to be from time to time transmitted by *Bruce* and Co. to the *Huddersfield* bank, and examined and ticked in the usual manner, except that the statement of the old account was only sent at the end of every six months. The *Huddersfield* bank do not appear to have ever objected to the accounts being kept separately by *Bruce* and Co., although in their own books they only kept one account. The arbitrator being of opinion that, under these circumstances, the balance due on the death of *Benjamin Ingham* was not wholly discharged, assessed the damages at the sum above awarded; but if the Court should be of opinion that

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the damages ought only to be nominal, then he directed that they should be reduced to the sum of one shilling. Upon the motion for a rule to reduce the damages to one shilling, in last *Michaelmas* term, the Court ordered that the award should be turned into a special case.

Campbell, for the plaintiffs. The remittances after *Benjamin Ingham's* death having been made generally, the plaintiffs had a right to appropriate them to the debts contracted by the new firm. In *Clayton's case (a)*, *Bodenham v. Purchas (b)*, and *Brooke v. Enderby (c)*, the expressions of the Judges have reference to the fact of there having been one continuous account for all the transactions before and after the change of the firm. This is evidence of the party receiving the money having applied it to the payment of the earliest items of the account. But it is impossible to contend, that a rest may not be made and a new account opened. The deceased or retiring partner may be indebted to the partnership, and there can be no right that the old debt should be satisfied by money of the remaining partners. The question, here, must therefore turn upon the effect to be given to the entries in the plaintiffs' books before

occasion of there being any communication between him and the payer, and this course was here pursued ; for in the first account rendered after *Benjamin Ingham's* death, the subsequent payments were appropriated to the new debt, and the old debt remains unsatisfied. He was then stopped by the Court.

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F. Pollock, contra. The *London* bankers were bound to apply the payments at the time of receiving them. That is expressly laid down by the Master of the Rolls in *Clayton's* case. (a) After observing that the rule with regard to the option given in the first place to the debtor, and to the creditor in the second, was taken from the civil law, he proceeds to state, that according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor ; and he then cites the words of the civil law, "in re præsentî ; hoc est statim atque solutum est : cæterum postea non permittitur." (b) The rule laid down refers to an act of appropriation to be done either by the party paying or receiving the money. The party paying money is bound to communicate his intention, that it shall be applied in payment of a particular debt to the party receiving it ; for otherwise the right of appropriation would devolve upon the creditor. The very act of communicating the intention is the act of appropriation. But where a creditor receives money without any appropriation by the debtor, the right of applying it in payment of any one of several debts devolves on the former. The appropriation is an act to be done by him only, and it is unnecessary that it should be com-

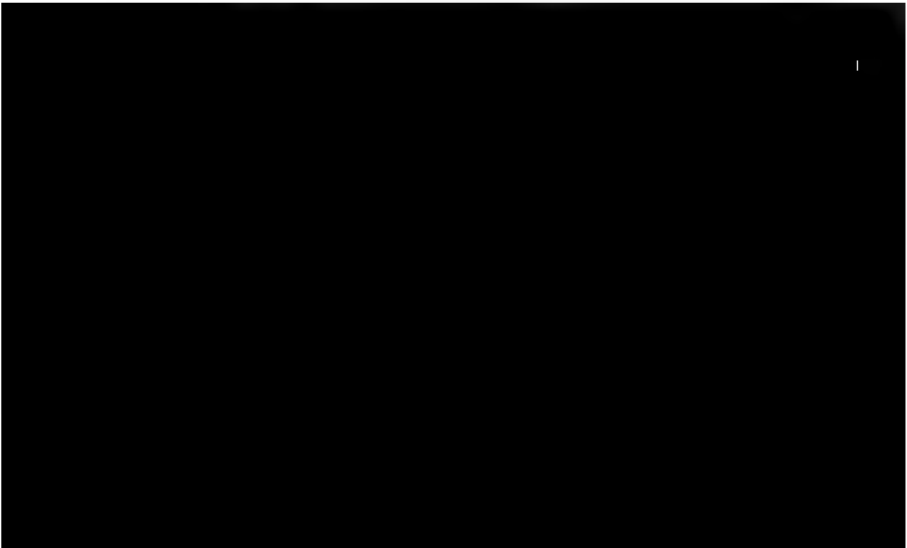
(a) 1 *Mcr.* 604.(b) *Dig. lib.* 46. tit. 3. qu. 1. 3.

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municated to the debtor ; for the latter not having made his election in the first instance, has no right to dissent from the appropriation made by the creditor. Here, therefore, the *London* bankers did, at the time of receiving the several payments, make the appropriation by entering them in their own books to the account of the old firm. The making of these entries constituted the act of appropriation ; and having once done that act, they had no right to make any alteration in the account, especially to the prejudice of the heirs and devisees of *B. Ingham*, who are mere sureties for any debts contracted by the new firm since his death.

BAYLEY J. (a) The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz. that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings



partner died in *September*, 1814. If, in the ordinary course of business, in *October*, 1814, a monthly account had been sent in, stating the transactions before and after the death of the partner as forming part of one entire account, and the balance as due from the survivors; in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death of the partner should be applied to any but the old account. In fact, the bankers in *London* did not send in any account after the death of the partner until *November*, and then they sent in two distinct accounts; one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in *London* expressed their dissent from making the whole one entire account. It has been insisted that, at that period of time, they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore that this award is right.

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SIMSON
against
INGHAM.

HOLROYD J.

1823.

SIMMON
against
JESSEMAN.

HOLBOYD J. I am also of opinion, that in this case the award is right. The persons paying the money not having made any direct applicatoin of it, the right of making such application devolved on the receivers; and if they have done no act which can be considered as such an application, it is equally clear, that although they did not apply it at the moment of payment, they would have a right to make the application at a subsequent period. The question therefore is, whether from any entry in the books there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered. Now, those entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books, shews only that the idea of so applying the payments had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect. In the case of *Cox v. Troy*, a party who had written his acceptance with the intention of accepting

sans to a particular account until those entries were communicated to the opposite party. That being so, I am of opinion that the bankers are not bound by those entries; and therefore that the award is right.

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SIMON
against
INGHAM.

BEST J. *Clayton's* case is altogether unlike the present. He had money in the banking-house at the time of *Devaynes's* death and afterwards paid in more money, which was blended in the same account. It was on the ground that the accounts were so blended that the Master of the Rolls decided that case. He thought there was no other appropriation than what arose from the order in which the receipts and payments took place, and according to that order, the money lodged in the house in *Devaynes's* lifetime was first paid. In this case, the payments after the death of *Benjamin Ingham* are appropriated by the rendering of the accounts, in which credit is given for them to the surviving partners, from whose hands these payments came. But it is said that this application of the money was made too late, and after the plaintiffs were precluded from so applying them, by their having previously entered them to the credit of the old firm. It is true that Sir *William Grant* says, in *Clayton's* case, that, by the civil law, the application is given first to the debtor, and then to the creditor, and that as well the creditor as the debtor must make his election at the time of payment; and that unless such election be immediately made, the law will appropriate it in discharge of the most burthensome, and if all are equally burthensome of the oldest debts. But according to the cases there cited, our law does not require from the creditor an instant decision. I think that he has a reasonable time
to

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 against
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to decide, to which account he will place a sum that has been paid him without any application of it by his debtor, and more than a reasonable time has not been taken by the plaintiffs. When once the creditor has made his election, he is bound by it. For the reasons given by my brothers, I think no election was made until the account was rendered to the *Huddersfield* bankers, and consequently that the award is right.

Judgment for the plaintiffs.

Thursday,
 June 12th.

COLEGRAVE against DIAS SANTOS.

The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still re-

TROVER for stoves, grates, kitchen-ranges, closets, shelves, brewing-coppers, cooling-coppers, mash-tubs, locks, bolts, blinds, &c. Plea, general issue. At the trial before *Abbott C. J.*, at the *Westminster* sittings after last *Michaelmas* term, the following were proved to be facts of the case. The plaintiff being the owner of a freehold house and estate, advertised them for sale, and printed particulars were circulated, which took no notice of the articles enumerated in the declaration.

hold, and refused to pay for them or deliver them up. The plaintiff demanded all the articles *as fixtures*; and in his particulars delivered under a Judge's order, described them *as fixtures*; and the refusal was of "the fixtures demanded." The Lord Chief Justice thought that some of the articles clearly passed by the conveyance of the freehold; but that others of them, viz. the stoves, cooling-coppers, mash-tubs, water-tubs, and blinds, were removeable as between landlord and tenant, and that the plaintiff might recover for them. The value of those articles was proved to be 50*l.*, and the plaintiff had a verdict for that sum, the defendant having leave to move to enter a nonsuit. A rule was accordingly obtained for that purpose, against which

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 COLERIDGE
 against
 DIAZ SANTOS.

Marryat and *Platt* now shewed cause. The question is, whether all those articles which were in the house, and belonged to the seller of the estate, necessarily passed to the purchaser by the conveyance of the estate. They may be divided into three classes. The first of which being clearly fixed to the freehold, must be admitted to have passed; the second class, consisting of fixtures, commonly so called, but removeable as between landlord and tenant, and the third, consisting of a few articles, not fixtures in any sense, remained the property of the plaintiff, and he is entitled to retain the verdict which was taken for the value of those articles. The conveyance must be construed to apply to the freehold only; *Ex parte Quincy* (a); which case also shews that trover will lie for such articles as brewing utensils. [Bayley J. The general rule relating to the right to fixtures, is that between the heir and executor; and, as between them, the second class of articles would belong

(a) 1 Atk. 477.

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COLGRAVE
against
DIAS SANTON.

to the heir: all the other cases as to landlords and tenants, and execution creditors, are mere exceptions in favour of trade.] At all events the plaintiff is entitled to a verdict for something; for a few of the articles, viz. mash-tubs, water-tubs, &c. were not fixtures, in any sense of the word.

Gurney and Storke contra were stopped by the Court.

ABBOTT C. J. I am of opinion that this rule must be made absolute. This was the case of a freehold house sold by auction. Printed particulars were circulated, and in them no mention was made of the vendor's right to the articles in the house. The usual course is to say that the fixtures shall be taken at an appraisement, or at a valuation to be made in some appointed mode; but here nothing at all was said respecting them. After the auction a conveyance was executed, the purchase money paid, and the defendant put into possession, all the articles which form the subject of the present action being still left in the house. The rule of law is most strict between the heir and executor. According to

Lee v. Risdon (a), Gibbs C. J. says, speaking of the power which tenants have to remove fixtures, "Unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it; and it never, I believe, was heard of, that trover could be afterwards brought." According to that opinion, nothing can now be done with respect to those things which may be considered as fixtures, whatever power the plaintiff might have had before he gave up the possession. There may, perhaps, have been in the house three or four trifling articles which were not fixtures, and the plaintiff insists that he is entitled to a verdict for them. But I think that he is not. Upon the evidence given at the trial, it appeared that they were included in a long list, together with many other things. The whole were demanded as *fixtures*, and the defendant refused to deliver the *fixtures demanded*. The plaintiff should have made a specific demand of those articles if he intended to rely upon them as distinguished from fixtures.

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BAYLEY J. If we were obliged to support the verdict which has been found for the plaintiff, we should be obliged to do great injustice. It is assumed that the fixtures were not intended to pass by the conveyance of the house. But there is nothing to prove that; and on the contrary, I think that as nothing was said about them at the time of the sale, the plaintiff has no right to make this claim. In the case of an heir selling a house which descends to him, in the absence of any express stipulation, he would be taken to sell it as it came to him, and the fixtures would pass. If the plaintiff may now insist upon payment for these fixtures, he might also after the sale of the house have refused to sell the fixtures, and might have done great injury to the house
by

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by taking them away. He should have insisted upon his right before the conveyance was executed. It is quite clear that the major part of the articles were so far fixtures as not to be the subject of larceny; but it is suggested that some of them were not fixtures. As to them I should be disposed to say, that if the seller gave up the estate with those things upon it, he must be considered as throwing them into the bargain. But at all events, in order to maintain this action, he should have made a specific demand, instead of including them amongst many other things claimed generally as fixtures.

BEST J. Where a stipulation is made that fixtures are to be taken at a valuation, that shews that they are not otherwise to pass. So of timber, if there be a provision that it shall be valued; if there be not, the wood passes with the land, and the fixtures with the house. In the absence of authorities, I should hold, that every thing which forms part of a house passes by a sale and conveyance of the house itself. If it descends, fixtures pass, so also if it be devised; why then should they not in the case of a purchase? But it is unnecessary to decide upon that ground, for there has been a delivery of

1823.

MERINGTON against BECKET, Gent., one &c.

ASSUMPSIT for goods sold. Defendant pleaded a sham plea, precisely similar to that pleaded in *Richley v. Proone* (a); and upon the authority of that case a rule nisi had been obtained, that the plaintiff might be at liberty to sign judgment, as for want of a plea, upon an affidavit stating that the plea was in every respect false. And now, after hearing *Comyn*, in support of the rule, and *Langlow*, contra, the Court said that it was very desirable that the proceedings should not be productive of unnecessary expense and delay; but that it was equally important that that object should be effected without breaking in upon any established principles, which would be the case if a defendant were to be compelled to verify his plea. If that might be done, the Court might be called upon to grant a rule to compel the plaintiff to verify, by affidavit, his cause of action. The truth of a plea of release had been enquired into, because a court of equity, would entertain the question; and this Court only does that in a less expensive way. The case of *Richley v. Proone* was decided upon the authority of what fell from Lord Holt, in *Peirce v. Blake*. (b) That case, however, is only an authority to shew that an attorney who puts a false plea upon the record may be fined; and if the defendant had not been an attorney, the Court might perhaps have granted a rule, calling upon the attorney to shew cause

The Court will not compel a defendant to verify his plea.

(a) 1 B. & C. 286.

(b) 2 Salk. 515.

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 against
 BUCKET.

upon what grounds he put the plea upon the record; and if he had not shewn sufficient grounds, he might have been fined for his improper conduct: but it would be going too far to treat the plea as a nullity, unless the defendant verified it. On a subsequent day the Lord Chief Justice said that calling upon the attorney to shew by what authority he put a sham plea upon the file, might not be effectual, and that the Court would consider whether some means could not be adopted for the prevention of sham pleading, without breaking in upon any established principle. In the meantime, however, until some such regulation could be devised, the practice must remain as it had been heretofore.

Rule discharged.

Friday,
 June 13th.

MURRAY, Administrator of W. MURRAY deceased, against The Earl of STAIR.

A subscribing witness to a bond stated that it was delivered by the obligor

DECLARATION on a bond, bearing date the 3d November, 1813, given to the deceased in the penal sum of 4000*l*. Plea, craving oyer of the bond, and

Henry Dalrymple, within six calendar months after the decease of his kinsman, *John Dalrymple*, Earl of *Stair*. The plea then stated that the bond was, on the 3d November, 1813, delivered by the defendant to *W. Saunders*, the subscribing witness thereto, merely as an escrow, on the condition that the same should remain in the hands of the said *W. Saunders* until the decease of the said *J. Dalrymple*, Earl of *Stair*, and that then and then only the bond should be delivered to the said *W. Murray*; that the said writing obligatory accordingly remained in the hands and possession of the said *W. Saunders*, from the time of the delivery thereof to him the said *W. Saunders* as aforesaid for a long time, and until he the said *W. Saunders*, before the decease of the *John Dalrymple* in the condition mentioned, to wit, on the 10th March, 1819, wrongfully parted with the possession thereof, and the same thereby wrongfully came into the hands and possession of the said *W. Murray*; and so the defendant saith that the said writing obligatory is not his deed, in manner and form as the plaintiff hath alleged. Second plea, that it was delivered as an escrow, on condition that the same should be delivered up to the said *W. Murray*, in case two promissory notes for 1000*l.*, then outstanding, should be delivered up to *W. Saunders*, to be cancelled; and that the said last-mentioned notes have not, nor hath either of them, been delivered up to the said *W. Saunders* for the purposes aforesaid, or otherwise. Upon these pleas issues were joined. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after *Trinity* term, 1822, *W. Saunders*, the subscribing witness, proved the execution of the bond, and also gave in evidence the following facts. He acted as the attorney of the defend-

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1823. ant when the bond was executed. At that time *Murray*,
the intestate, held two promissory notes of the defend-
ant's, and had threatened to put them in suit. The de-
fendant, in consequence, proposed to give the intestate
the bond in question, but desired that it should not go
into the market before the death of Lord *Stair*, as that
might have the effect of creating a prejudice in his mind
to defendant's disadvantage. It was agreed by all the
parties, before and at the time of the execution of the
bond, that it should remain in *Saunders's* hands until the
death of Lord *Stair*, and that it should not even then
be delivered up to *Murray* until he gave up the notes,
and the defendant would not have given the bond
unless that had been assented to. The bond, how-
ever was attested, sealed, and delivered in the usual
way, and no other than the words usual on the exe-
cution of a bond were used by the defendant when he
executed the bond in question. In 1812 *Saunders*
had been a surety for the wife of the intestate, upon
her taking out letters of administration; and he desired
an indemnity to protect himself, and he kept the bond
in question partly for his own security. Some weeks
after it had been executed, *Murray*, the intestate, told

was to remain in his hands until the death of Lord *Stair*, and until the notes were delivered up. Upon this evidence it was contended, that the plaintiff ought to be nonsuited, inasmuch as it appeared to be the intention of the parties that the instrument should not operate as a deed until the death of Lord *Stair*; and *Johnson v. Baker* (a) was cited. The Lord Chief Justice reserved the point, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained in last *Michaelmas* term,

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The *Solicitor-General*, Gurney, and Comyn, in *Easter* term shewed cause. The defendant delivered the instrument as his deed, and it took effect as a deed from the moment of such delivery. In order to make it operate as an escrow, the defendant ought, at the time of the execution, to have said that it was to become his deed only upon the death of Lord *Stair*, and upon the delivering up of the two notes; but having delivered it as his deed, with a request to *Saunders* to keep it till the notes were delivered up, it operates as such from the moment of its delivery. This distinction is pointed out in *Sheppard's Touchstone*, 58. The learned author, after defining an escrow, states "that it is essential that the form of words used in the delivery of such an instrument should be apt and proper, as, for example, I deliver this to you as an *escrow* to deliver to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon condition that he deliver up the old bond he hath of mine for the same money, (or as the case is,) or I deliver this to you as an escrow, to keep until such a day, upon condition that

(a) 4 B. & A. 440.

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if before that day, he to whom the escrow is made shall pay to me 10*l.* or give me a horse, or enfeoff me of the manor of *Dale*, or perform any other condition, that then you shall deliver the escrow to him as my deed. But if when the deed is delivered to the stranger, I use these words 'I deliver this to you as my *deed*, and that you shall deliver it to the party upon certain conditions; or to deliver to him to whom it is made when he comes to *London*,' in this case the deed takes effect presently, and the party is not bound to perform any of the conditions." This is an authority to shew that the intention that an instrument should operate as an escrow, should be clearly expressed at the time of execution. (a) But assuming that not to be necessary, it sufficiently appears from the whole of the evidence to have been intended that this should operate as an effective deed from the moment of its execution. It was given to prevent two other effective securities from being put in force against the defendant. It was left in the hands of *Saunders*, his own attorney, in whom he had a special confidence; and *Murray* the deceased understood it to be a valid security, for he told *Saunders* that he was secure against any claims that might

of the bond, that it was agreed both before and at the time of the execution, that it should remain in the hands of him, the defendant's attorney, until the death of Lord *Stair*, and until the notes were delivered up; and that unless that had been assented to by *Murray*, the defendant would not have given the bond; and in his cross-examination, *Saunders* stated that it was delivered upon that express condition. He was then stopped by the Court.

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ABBOTT C. J. Upon further consideration, we are all of opinion that there ought to be a new trial in this case, and that it should be presented as a question of fact for the jury upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of such delivery, or whether it was delivered to *Saunders* upon the express condition that it was not to operate as a deed until the death of the then Lord *Stair*, and then only upon the delivering up of the two promissory notes. The jury must draw their conclusion from the whole of the evidence given by *Saunders*; and it will be competent to either party who shall be dissatisfied with my direction to tender a bill of exceptions, and the question may be raised upon the record, whether an instrument can in any case operate as an escrow, unless the party at the time of its execution uses express words to shew his intention that it should not operate as a deed until a given event happen.

Rule absolute for a new trial.

The cause was tried again at the sittings after *Easter* term; and *Saunders* having given nearly the same evidence, the Lord Chief Justice told the jury that

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if the instrument was delivered as the deed of the defendant binding on him at the time, although it was delivered on the faith and confidence which he reposed in *Saunders* his attorney that he would not part with it until the death of Lord *Stair*, and until the notes were delivered up, that it immediately became the defendant's deed, and although *Saunders* in fact parted with it before Lord *Stair's* death, and before the delivering up of the two notes, in violation of the trust reposed in him, it was still the defendant's deed in a court of law, whatever relief he might obtain in a court of equity; that it was like the common case where a conveyance is executed before the consideration money is paid, and the deed is left in the hands of the attorney until it is paid, although the attorney parts with it before payment, there is no relief at law. But if the delivery itself at the time was conditional, so as not to constitute any present obligation, it was an escrow or writing merely, and not a deed; and the condition of the delivery having been broken, it had never become the deed of the defendant. To make the delivery conditional, it was not necessary that any express words should be used at the time. The conclusion was to be

plaintiff, a rule nisi was obtained in this term for arresting the judgment, on the ground that the death of Lord *Stair* mentioned in the condition was not averred; and secondly, that the plaintiff ought to have assigned breaches according to stat. 8 & 9. *W. S. c. 11. s. 8.*

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 against
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Comyn was now heard against the rule, and *Scarlett*, *Marryat*, and *E. Lawes* in support of it.

As to the first point, the Court, during the argument, intimated their opinion that an averment of the death of Lord *Stair* was wholly unnecessary, inasmuch as the condition of the bond set out in the plea contained that which was matter of defence if the event had not happened; the defendant might therefore have pleaded it; but he not having done so, the plaintiff was not bound to shew the death of Lord *Stair*. *Meredith v. Alleyn*. (a) *Lockey v. Darby*. (b) And *Holroyd J.* said that in the common case of a bond conditioned for indemnifying, if the defendant sets out on oyer the condition of the bond, he must plead non damnificatus, in order to make the plaintiff shew a damage. Upon the other question, whether it was necessary to suggest breaches upon the record, *Tidd's Practice*, 604., *Wardell v. Fermor* (c), and *Cadoza v. Hardy* (d), were cited on the part of the plaintiff. For the defendant it was said, that in *Cadoza v. Hardy* it did not appear upon the record that it was a post obit bond but the question merely was, whether there should be judgment for want of plea; and it was said that the statute of the 8 & 9 *W.* applied to all bonds upon the face of which it did not appear that any thing, and how much was due; and they cited *Walcot v. Goulding* (e), *Willoughby v. Swinton* (f),

(a) 1 *Salk.* 138.

(c) 2 *Campb.* 282.

(e) 8 *T. R.* 126.

(b) 1 *L. Raym.* 108.

(d) 2 *B. Moore*, 220.

(f) 6 *East*, 550.

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Welch v. Ireland (a), Ex parte Winchester (b), Middleton v. Bryan. (c)

ABBOTT C. J. I am of opinion that this bond does not come within the operation of the 8 & 9 W. 3. c. 11. s. 8., by which it is enacted, "that in all actions upon bonds or on any penal sum for non-performance of any covenants or agreements in any deed or writing, the plaintiff may assign as many breaches as he shall think fit." The statute then goes on to direct that the jury are to assess the damages for the breaches so assigned; and if the defendant pay into court the damages so assessed by reason of the breaches of the covenant, together with the costs of the suit, a stay of execution is to be entered upon the record, but the judgment is to remain as a further security to answer to the plaintiff such damages as may be sustained by further breaches of covenant. The words of this statute are large and somewhat obscure. It is now, however, fully established by decided cases, that bonds for the payment of annuities, or of money by instalments, are within the statute; but that bonds for the payment of a sum certain, at a day certain, are not within it. Bonds for the payment of annuities are

intervention either of a jury, or a court of equity is unnecessary. This is a bond for the payment of a sum certain, at a time that may be rendered certain, and which, upon this record, must be taken to have been rendered certain by the happening of the event contemplated by the condition. And although the day be not mentioned in the condition, yet being ascertained by the happening of the event, nothing but computation was necessary in order to ascertain the precise sum due. That being so, I think that this is a bond for the payment of a sum certain, at a day certain, and therefore not within the statute of *William*. It is not necessary to decide whether it be, or be not within the 4 & 5 *Anne*, c. 16.; but I am strongly of opinion that it is. The judgment of Lord *Hardwicke* in *Exparte Winchester* (a) is an authority against that position. In *Wyllie v. Wilkes* (b), however, Lord *Mansfield* seems to have disapproved of what fell from Lord *Hardwicke* upon that occasion, and it appears that the judgment in *Exparte Winchester*, went farther than was necessary. In that case the father of the wife had given a bond to the husband to pay him the principal sum of 1000*l.* after the death of himself and his wife, and interest at 4 per cent. by half yearly payments in the meantime; and it appeared that half a year's interest had become due at *Christmas*, and was not paid till the 10th *January*, and therefore that the bond had become forfeited. The obligor and his wife were still living; it seems, therefore, that the principal had not become due at all, and consequently the day of payment of that sum had not been ascertained by the happening of the event mentioned in the condition. That bond was clearly not a bond within the statute of 4 & 5 *Anne*

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(a) 1 *Atk.* 118.(b) *Doug.* 519.

1823. c. 16. In this case the principal had become due
by the happening of the event; and I think it clearly
a case within the statute of 4 & 5 Anne, c. 16., and that
it would have been competent to the defendant to have
pleaded that the money due had been tendered before
the action was brought.

MURRAY
against
Earl of BRANK.

BAYLEY J. I am of opinion that this falls within the
case of *Cadova v. Hardy*, and that that case was properly
decided.

HOLROYD J. I am of the same opinion. The stat.
of 8 & 9 W. 3. c. 11. s. 8. seems to have contemplated
bonds by the condition of which more than one act was
required to be done; for it directs that the judgment shall
be for the penalty, but that execution shall be for the
damages assessed only, and that the judgment shall re-
main as security for further damages that might occur.
The main object of the legislature was to make it un-
necessary for parties to go into a court of equity to obtain
relief. Now, where the penalty was a security for the
doing of several acts, it became the debt at law by the
non-performance of any one. And it was necessary

for it is perfectly clear that if this bond be within the 4 & 5 *Anne*, c. 16., it is not within the statute of 8 & 9 *W. 3.* c. 11. Now I think this a case both within the words and spirit of the statute of *Anne*. The 12th section of that statute enacts “that where an action of debt is brought upon any bond which has a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, before the action brought, pay to the obligee the principal and interest due by the defeazance or condition of such bond, although such payment was not made strictly according to the condition or defeazance, yet it shall be pleaded in bar of such action, and shall be as effectual a bar to such action as if the money had been paid at the day and place, according to the condition or defeazance, and had been so pleaded.” It is said that this is not within that section of the statute, because the money is not made payable by the condition at a day certain. Now it must be taken upon these pleadings, that the death of Lord *Stair* had happened before the commencement of the action, for otherwise no action could have been maintained. That being so, the day of payment had become certain, according to that maxim of law, “*id certum est quod certum reddi potest.*” Therefore this action was brought upon a bond which, at the time of the commencement of the action, had a condition to make void the same upon payment of a lesser sum at a day certain. It falls therefore within the very words of the twelfth section of the statute. The thirteenth section then enacts “that if at any time pending an action upon such bond, the defendant shall bring into court all the principal and interest due on it, and also such costs as have been expended in suits at law or in equity, the money so brought in shall be a full discharge

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against
Earl of SCARLE.

discharge of the bond. Now the defendant, after the commencement of an action upon this bond, might have paid into court the principal, and interest, and costs, for they were the subject of computation. This is therefore a bond within the meaning of that section. The mischief contemplated by the statute was that where a bond was conditioned for the payment of a lesser sum at a day certain, and payment was not made at the day, the penalty became the debt at law; and payment after the day could not be pleaded in a court of law in bar of the action; and even pending the action, the payment of the principal, and interest, and costs, would not be a ground for discontinuing it, but the obligor of the bond was driven to a court of equity. Here, before the statute, the obligor would have been obliged to apply to a court of equity for relief if he had not paid the money at the day. This is therefore clearly a bond within the mischief contemplated by the legislature.

BURR J. I am clearly of opinion, both upon authority and principle, that this case is not within the statute of the 8 & 9 W. 3. c. 11. That statute is highly remedial, and calculated to advance justice and to give



the damages are unliquidated, and must be ascertained by the verdict of a jury, as in cases of breaches of covenant. In this case, the whole sum that the plaintiff could ever become entitled to, became due at one time. There was no occasion, therefore, to summon a jury to assess the damages; they were the subject of computation only.

1823.

—
MURRAY
against
Earl of STAIR.

Rule discharged.

— against JOHNSON.

LATITAT issued against *Thomas Johnson* was, by mistake, served on his father, *J. Johnson*, who lived in the same house. The plaintiff's attorney enquired for common bail, and a person in the office said it was filed. A declaration was then delivered against *T. J.* The attorney returned it, saying that he had appeared for *J. J.* sued as *T. J.* Plaintiff's attorney said he had no action against *J. J.*, and sued out an alias and pluries against *T. J.*, who was served with the pluries.

Where a latitat has by mistake been served upon a wrong person; the right person may afterwards be served with an alias issued upon it.

Comyn moved to set aside the writ, and contended, that having been served on *J. J.* it was functus officio, and therefore no alias could be sued upon it.

Patteson, contra, contended that the service upon *J. J.* was altogether a nullity, and that the latitat was not in any way affected by it.

BAYLEY J. (a) The service of the latitat upon a wrong person by mistake was the same as no service at all. The writ was not affected by it, and consequently the alias and pluries were good.

Rule discharged.

(a) The only Judge in court.

1823.

Saturday,
June 14th.

HARDING against WILSON.

Where a lease of premises described them as abutting on "an intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an underlease was granted, describing the premises as abutting on "an intended way," not mentioning the width: Held, that the underlessee was entitled to a convenient way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual

CASE. The declaration stated that the plaintiff was possessed of a dwelling-house, and, by reason thereof, was entitled to a way from a common highway to his house, for horses, cattle, carts, and carriages; and that defendant obstructed the way by building a wall upon it. Plea, not guilty. At the trial before Abbott C. J., at the *Westminster* sittings after last *Michaelmas* term, the following evidence was given. In *August*, 1809, a lease of a piece of ground was granted by one *Sloane* to *W. Bolton*; the abuttal on one side was described as "an intended way of 30 feet wide." The ground over which the way was to be made also belonged to the lessor. In 1811, *Bolton* underlet to plaintiff's landlord (one *Pittard*) a part of the ground so demised, "together with all ways thereunto appertaining;" and it was described as abutting "on an intended way," without mentioning any width. *Pittard* built a house upon it, of which the plaintiff was tenant. In 1820, the defend-

Justice observed, that the plaintiff had not a grant of a way of any particular width, and left it to the jury to say, whether, under those circumstances, the wall was a nuisance. The jury found a verdict for the plaintiff, with nominal damages; and in *Hilary* term a rule nisi for a new trial was obtained, against which

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against
WILSON.

Gurney and *Andrews* now shewed cause. The plaintiff's landlord was entitled to a way thirty feet wide. The first lease described the intended way as thirty feet wide; and the second lease, speaking of "the intended way," must have meant one of that width. No doubt the first lessee was entitled to a way thirty feet wide, and his under-tenant had the same rights. At all events, the question, whether the wall were or were not a nuisance, was properly left to the jury; and although according to the evidence it was possible for a carriage to turn round upon the road, still they were warranted in finding that it was not so commodious as before the wall was built. That was properly a question for them, and there is no reason to disturb their verdict.


Scarlett and *Littledale*, contra. The lease to *Pittard* did not contain any grant of a way of a particular width. The property is described as bounded by an intended way, not saying how wide that was to be. There was no privity between the under-tenant and the original lessor so as to entitle him to all the privileges granted by the first lease; and even if there were the description in that, it does not amount to a grant of a way thirty feet wide. At the utmost, it would only amount to a covenant by *Sloane* to *Bolton* to make a way of that width; and until the way was set out, the party could

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only have a right to a convenient way. Although the way may at one time have been thirty feet wide, still the plaintiff must fail unless he can shew a grant; for his possession has not been long enough to warrant the presumption of one. It must be admitted that he is entitled to a convenient way, and accordingly his declaration claims generally a right of way for horses and carriages; and the evidence fully established that he has a convenient way for them, notwithstanding the erection of the wall. If *Bolton* was entitled to a way of thirty feet wide, no doubt he might abridge that right in an under-lease; and here he did so, by using the words "intended way," without specifying any width. If the plaintiff had in this instance the right which he claims, all under-tenants must be entitled to every privilege contained in the original lease.

ABBOTT C. J. It appeared by the evidence at the trial, that the road now left in front of the plaintiff's house was as wide as convenience required, and that the plaintiff himself had declared that he sustained no inconvenience from the erection of the wall. His landlord, however, has a right to sue in his name; but as no



the evidence negatived any such damage. I am therefore of opinion that there ought to be a new trial.

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against
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BAYLEY J. I am of opinion that this question depends upon the construction of the original lease. *Bolton* had a right to some way, and he might have bargained for a road of a particular description. Without any express stipulation the law would give him a way of necessity, for the convenience of the houses which were to be built. In this case there was not any express stipulation as to the width of the way, but the abuttal was described as an intended way thirty feet wide. That was merely the intention of the owner of the soil. He does not expressly engage that the road shall be of that width. It was his intention to make it so at the time; but he uses no words which could fetter his intention, and prevent a deviation from it, provided a convenient way was left for *Bolton* and his under-lessees.

HOLROYD J. The plaintiff's claim, as stated in his declaration, is of a right to pass and repass on foot and on horse-back, and with cattle, carts, and carriages. He does not specify the particular width of the way; but the declaration would be sufficient, provided he proved a title to a way thirty feet wide. The ground on which the plaintiff's messuage is built, and the road also, originally belonged to *Sloane*. When he demised it, the party renting would have no right of way but such as was incident to the lease, or such as was expressly given. Upon the evidence, it appears that he still has a convenient way. But the plaintiff says that by the lease, a way thirty feet wide is given either expressly or by implication. It certainly is not given

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HARDING
against
WILSON.

expressly. The intended way is no part of that which was granted; and the declaration of an intention is not an implied grant. Again, the under-lease describes the ground demised, and the ways granted by the words "all ways thereunto appertaining." The road in question being over the soil of the original lessor, would not pass by those words. Leases generally contain the words "heretofore used," by which such a way would pass. But in the absence of them, or any other words to the like effect, the under-lease would confer nothing more than a convenient way. The rule for a new trial must therefore be made absolute.

BEST J. concurred.

Rule absolute.

Tuesday,
June 17th.

BISHOP *against* HOWARD.

Where *A.*, who held premises under a lease which expired at Midsummer.

ASSUMPSIT for use and occupation. Plea, general issue. At the trial before *Abbott C. J.*, at the London sittings after last *Michaelmas* term, it appeared

rent at *Michaelmas*; but it was proved that the defendant paid a quarter's rent in *March*, 1822, and took a receipt for it, as for a quarter's rent due to the plaintiff at *Christmas*. This action was brought to recover a quarter's rent alleged to be due at *Lady-day*, 1822. The Lord Chief Justice left it to the jury to say, whether a new agreement for a tenancy could reasonably be inferred from that which had passed before Midsummer, 1821, and from the payments above mentioned, or whether it was merely a holding over by the defendant. The jury found a verdict for the defendant; and in *Hilary* term a rule having been obtained for a new trial,

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 BISHOP
 against
 HOWARD.

Scarlett and *R. Scarlett* now shewed cause. After the expiration of the old lease the defendant was merely a tenant at will, and there could be no yearly or quarterly tenancy unless there were a fresh contract. But that was negatived by the jury. *Right dem. Flower v. Darby* (a) proceeded on the ground of such supposed contract. Here, no such contract existed before Midsummer, 1821, and therefore no continuation of it could be presumed. No notice to quit was necessary at Midsummer, for the term ended on a precise day. *Messenger v. Armstrong*. (b) And the defendant had a right to quit at *Christmas* when he tendered the keys of the house, the jury having found that no fresh contract was made. It appears as if there had been a mistake between the parties, and that they supposed the old tenancy to end at *Michaelmas*. That explains the defendant's refusal to give up the possession at Midsummer, and does away with the idea that any new tenancy was con-

(a) 1 T. R. 159.

(b) *Ibid.* 55.

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against
HOWARD.

templated by the parties. In *Zouch dem. Ward v. Willingale (a)*, where the landlord had distrained after notice to quit, that was certainly held a waiver of the notice; but there the defendant had before been tenant from year to year. Here there was no such previous tenancy; and the jury negatived the existence of a new agreement.

F. Pollock, contra. The evidence established a tenancy from year to year, or at least from quarter to quarter, as a presumption of law, and it was not a fit question for the consideration of the jury. Before Midsummer, the plaintiff asked if the defendant would give up the possession, and the defendant refused to do so, and claimed a notice to quit. He must then have considered himself a tenant, and what was formerly a tenancy at will is now held to be a tenancy from year to year. *Doe dem. Flower v. Darby.* *Doe v. Watts. (b)* *Doe v. Weller. (c)* It is not necessary that rent should have been paid for a whole year; payment for one quarter at *Christmas* was sufficient. Had the landlord brought ejectment against the defendant without notice, the production of the receipt for rent would have been an answer

it to them to say, whether a tenancy was created, or whether there was a mere holding over by the defendant; and they found for him. If those acts were conclusive evidence of a new tenancy from year to year, my direction was wrong, and there ought to be a new trial. My learned Brothers think that the commencement of another year and the payment of rent concluded the question in favour of the plaintiff. I have still some slight doubts upon the question, but defer to their authority.

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against
HOWARD.

BAYLEY J. It appears that, before Midsummer, in a conversation between the plaintiff and defendant, the latter insisted upon his right to have a notice to quit; that was holding himself out as tenant of the premises. He continued in possession until *Christmas*, and in *March* following, paid rent for the quarter ending at *Christmas*; that was evidence that a quarter's rent had been paid at *Michaelmas*. If he paid that money as rent, it took away his power to say that he was not tenant, as the receipt of it took away that power from the landlord. In the case put of an ejectment brought to recover possession, the production of the receipt or proof of the payment of rent at *Michaelmas* would have been a bar to the action; and the situation of the plaintiff would be singularly hard if he could not maintain either use and occupation, or ejectment. I think, therefore, that there should be a new trial.

HOLROYD and BEST Js. concurred.

Rule absolute.

1823.

Wednesday,
June 18th.

The KING *against* THOMAS DOLBY.

The panel of tales having been quashed in a special jury case, on the ground of *unindifference in the sheriff*: *Held*, that a *vanke* *facies* was properly awarded to the coroner, although two of the special jurymen appeared and were sworn on the former occasion.

Upon an award of tales at *Nisi Prius*, it is not necessary that the tales should be selected out of persons accidentally present; they may be selected out of persons whose presence the sheriff or

INDICTMENT for libel. The case came on for trial before *Abbott C. J.* and a special jury, at the *Middlesex* sittings after *Michaelmas* term, 1821. Two of the special jurymen only having appeared, the prosecutor prayed a tales; the defendant challenged the array of tales, on the ground that *John Garratt, Esq.*, one of the two persons who together constituted the sheriff of *Middlesex*, was, at the time of arraying the panel of tales, one of the prosecutors of the said indictment. Upon which challenge the prosecutor took issue, and triers were immediately appointed, who found for the defendant on the challenge. The panel of the tales was thereupon quashed, and the cause made a remanet to the sittings after *Hilary* term, 1822. In the course of that term a rule was obtained for entering a suggestion on the roll, that *John Garratt*, who, together with *W. Venables*, made one sheriff, &c. was one of the prosecutors of the said indictment; and further order-

objected by the defendant's counsel, that there ought to have been a writ of decem or octo tales; but this objection was overruled, and the Lord Chief Justice called on the coroners, to summon instantly such of the bystanders as in their discretion they should think fit. Mr. *Sterling*, the only coroner present, was proceeding to obey this order; it was objected by the defendant's counsel, that the venire was awarded to the coroners in the plural, and that the return must be made by both. The Lord Chief Justice allowed the objection, and the case was made a remanet. The indictment again came on for trial at the adjourned sittings after *Trinity* term, 1822, and the special jurymen having been called over, and six having appeared, amongst whom were the two who appeared on the first occasion, the officer was proceeding to swear talesmen, when the coroners' return was objected to, on the ground, that as two special jurors had appeared when the case was first set down for trial, the coroners ought to have then summoned a sufficient number to make up the deficiency, instead of summoning a full jury. This objection was overruled. It was then objected that the coroners, in violation of the statute which directed that the tales should be chosen de circumstantibus, had, by letter, requested persons to attend as jurors. The tales were taken from the common jury panel, from which talesmen were usually summoned. The Lord Chief Justice overruled the objection, and the defendant was tried, and found guilty. A rule nisi for a new trial was obtained, in *Michaelmas* term, upon three grounds: first, because the coroners had summoned the talesmen, instead of taking those who were accidentally present; secondly, that there was a mistrial, it appearing that

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The King
against
Daley.

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against
DOLLY.

that the special jury had been summoned by the coroner, to which, when summoned by the sheriff, there was no challenge, and two of the special jurymen had appeared when the case was first called on for trial; thirdly, that there were two venires on the record.

Gurney and Tindal, on a former day in this term, shewed cause. It would be extremely harsh to presume that the coroners would be guilty of an offence, when there does not appear the slightest ground for suspecting one. But, unless it be shewn that they acted corruptly in summoning certain persons to serve as talesmen, the objection to those who were summoned, cannot prevail. The offence of embracery most nearly resembles that which is now imputed. But a coroner cannot be guilty of that unless he acts corruptly. *Bacon's Abr. tit. Juries, Judgment in Attaint* (9). It is not enough to shew that the coroner, a known officer of the court, has brought certain persons into court to provide for a deficiency of special jurymen. Some improper motive must be shewn, which cannot be done in this instance, as what he did was in obedience to a rule of court. As to the objection, that there is a second venire

4 & 5 Ph. & M. c. 7. to prosecutions tried at nisi prius. By the 7 & 8 W. 3. c. 32. s. 3., an act for the ease of jurors, the sheriff is directed to return as talesmen, those who shall be returned upon some other panel to serve at the same assizes. And by the 3 G. 2. c. 25. the same panel is to be annexed to every venire facias; and the 15th section of that act says, that when a special jury has been struck, that shall be the jury to try the cause. *Rex v. Perry.* (a) The mode of proceeding adopted in this case, was the only one by which those statutes could be obeyed. The list of special jurymen was handed to the coroners; they summoned them all, and returned the common venire panel for the talesmen. Had a writ of decem tales issued, that would have been in violation of the 3 G. 2. c. 25. s. 15. Had any other talesmen been taken, the 7 & 8 W. 3. c. 32. would not have been observed. The 42 Ed. 3. c. 11. manifestly does not apply to the tales, but only to the original panel returned upon the venire. *Symonds v. Walsh* (b) by no means proves that there cannot be two venires. There the judgment was reversed, because the venire was awarded to the wrong person; and in *Pretious v. Robinson* (c), it appears that the jury were selected from different panels returned to the two venires, and no ground was assigned for issuing the second venire. And on the other hand, *Rex v. The City of Worcester* (d) and *Sir Percival Willoughby v. Egerton* (e) shew that there may be a second venire where the sheriff is unindifferent. Now here there is a suggestion on the record, that the sheriff was not the

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The King
against
DOLBY.

(a) 5 T. R. 453.

(b) Cro. Jac. 547.

(c) 2 Ventr. 173.

(d) Skin. 105.

(e) Cro. Jac. 35.

proper

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—
The King
against
Dowry.

proper officer to return the jury; that has not been denied, and, therefore, the venire was properly awarded to the coroners.

Scarlett and Evans, contra. The coroner ought not to have used means to procure the attendance of particular individuals as talesmen. If the coroner might so collect persons, the sheriff, in all criminal cases, might act in the same manner; for the 7 & 8 W. 3. c. 32., requiring the sheriff to return such persons to serve upon the tales as shall be returned upon some other panel, does not apply to criminal cases. He might collect persons whom he, from bad motives, procured to attend. Nay, it is possible that some of the very twelve persons to whom the defendant had objected, as special jurymen, might, by such means, be called upon to serve as talesmen. A verdict of acquittal or of guilty might in all criminal cases be made certain, if the officer returning the jury was so disposed. By the common law no persons could be summoned on the tales without affording to the party accused the opportunity of knowing beforehand who those persons were to be. By the 42 Edw. 3. c. 11. it is ordained, that no inquest except assizes and deli-

the attendance of the persons he so selected; but there is no such process. As to the other point, if *The King v. Edmonds* (a) be law, the special jury panel could not be challenged, because the sheriff was not unindifferent. The special jury in this case was not challenged, and the sheriff, therefore, ought to have summoned it; and if the jury was not full, the coroner might have been present and summoned a tales. The suggestion does not affect the question, because, unless it stated a legal ground for directing the process to the coroner, it would not make the proceedings legal. *Symonds v. Walsh*. (b) If *The King v. Edmonds* be not law, then the defendant is entitled to a new trial, because his counsel was prevented challenging the array of the special jury. *Prentiss v. Robinson* (c) is an authority to shew that there cannot be two venires on the record.

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The King
against
Dolart

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court.

This case came before us on a motion for a new trial. Two objections were taken to the proceedings; first, that the award of a venire facias juratores to the coroners, after a prior award of a similar process to the sheriffs, on which something had been done, was irregular; and, secondly, that upon the prayer and award of a tales at Nisi Prius, under which the cause was actually tried, the tales ought to have been taken out of the persons who should happen to be accidentally present in court, without any previous measure adopted

(a) 4 B. & A. 471.

(b) Cro. Jac. 547.

(c) 2 Vent. 173.

by

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—
The King
against
Dexter.

by the coroners to obtain the presence of any persons whom they might consider to be proper persons to constitute the tales, if a tales should become necessary.

The first objection was argued very much upon a supposition that the process to the coroners directed them to summon other persons than those who had been previously summoned by the sheriffs. But this supposition is not warranted by the language of the record, for the direction to the coroners is only to cause to come twelve good and lawful men, not twelve other good and lawful men; and in fact, this being a special jury cause, though it does not so appear on the record, the primary panel returned by the coroners contained, as it ought to have done, the same identical names, and no others, as the panel previously returned by the sheriffs on the process directed to them, being the persons nominated under the rule of court, and in conformity to the act of parliament. And the effect and substance of the whole proceeding was precisely the same as if an octo or decem tales had been awarded, according to the ancient course of proceeding, prior to the statutes giving the tales according to the practice now in use. So that the case has been tried by the very *principal jurors*, by whom,

No objection was made at the trial to the individuals summoned and appearing: nor was it alleged that the coroners had, in the particular instance, acted from any improper motive or design. But the objection was put upon general principles; upon the supposed danger of allowing a coroner, or sheriff, to secure the attendance of persons chosen by himself, and thereby in effect to select a part of the jury. This objection is in direct and manifest contradiction to the whole principle and practice of the common law. By the common law, the person to whom the jury process was directed, whether sheriff or coroner, as the case might be, chose whom he would summon to attend, and place upon his panel: if a full jury did not appear, and a decem or octo tales was awarded at the common law, the sheriff or coroner in like manner selected the persons in execution of this process. Our common law acknowledges no such absurdity as taking, by chance and hazard, the persons who are to discharge the important duties of jurymen. It has ordained that this shall be done by some known and responsible officer, who may be punished if he act amiss. Even under the statute 35 *Hen. 8. c. 6.*, which gave the tales de circumstantibus, as it is usually called, a discretion is to be exercised by the officer. The provision was made, as appears by the words of the fifth section, "for the more speedy trial of issues," not for the prevention of partiality, as was suggested at the bar. And by the sixth section, the sheriff or other minister, is "to name and appoint so many of such other able persons of the county as may be present at the said assizes, or nisi prius," as shall be sufficient to make up the number required. Nomination and appointment import selection.

A dis-

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The King
against
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against
DOLBY.

A discretion is to be exercised, though the number of the persons out of whom the choice is to be made is of necessity limited to those who may happen to be at the assizes, or nisi prius. And it was well observed, on the part of the crown, that such a proceeding as was adopted by the coroners on this occasion, is much less open to the probability of an unfair trial, than the taking the tales from those who may happen to be present in court; inasmuch as either party may on a trial take measures to fill the court with his own friends and partizans. For these reasons we think the rule for a new trial ought to be discharged.

Rule discharged.

The KING *against* ALTHORNE. (a)

The pauper was
hired to serve
as a servant in
husbandry from
Michaelmas,
1821, to Mi-
chaelmas, 1822,

ON an appeal against an order of two justices, for the removal of *John Wiggins* and *Elizabeth* his wife, from the parish of *Mayland* to the parish of *Althorne*, both in the county of *Essex*, the sessions

was settled in *Althorne*, at *Michaelmas*, 1821, agreed with Mr. Croil, a farmer in the parish of *Mayland*, to live with him as his servant in husbandry from that *Michaelmas* till the *Michaelmas* following, at 10s. per week for the winter half year, and 11s. per week for the summer; and if he and his master could not agree for the harvest month, the pauper was to harvest for himself where he pleased." Previous to the harvest the master offered the pauper 5*l.* for the harvest, which he agreed to take; and accordingly continued in his master's service during the whole year."

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The King
against
Althorne.

Jessopp, in support of the order of sessions, was stopped by the Court.

Brodrick, contra, contended, that this was a conditional and not an exceptive hiring, and that, as the pauper actually served for the whole year, he gained a settlement in *Mayland*.

But *per Curiam*. The service would not have continued for the whole year, unless after the original hiring a new bargain had been made for the harvest month. There was not then any one hiring for a year; and therefore, although the pauper actually served for a year, it was not such a service as confers a settlement.

Order confirmed.

1829.

The KING *against* The Inhabitants of BYKER.

A pauper was by indenture hired for a year as a driver in a colliery, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day more when that time was exceeded; and he was to forfeit 10s. 6d. for every act of disobedience, and 3s. 6d. per day for lying idle (to be deducted out of his wages). There was a proviso, that nothing in the indenture should be construed to oust the jurisdiction of the justices, or to prevent either master or

UPON an appeal against an order of two justices for the county of *Durham*, for the removal of *William Gray* and *Mary* his wife, from the township of *Haughton-le-Spring*, in the said county of *Durham*, to the township of *Byker*, in the county of *Northumberland*, the court of quarter sessions at *Durham* confirmed the order, subject to the opinion of this Court, upon the following case. By an indenture, bearing date the 23d day of *October*, 1809, and purporting to be made between *James Potts* of *Byker*, in *Northumberland*, of the one part, and the several persons whose names or marks were thereunto subscribed, of the other part, the said *James Potts* did hire and retain the several other parties thereto, and they did hire and bind themselves as workmen or servants, to be employed in a certain colliery for the term of a whole year, from the 21st day of *January*, 1810, and to serve *J. P.* in the colliery for cer-

to the manner of working the colliery, and work the colliery fairly and regularly, and as therein further expressed; or in default thereof, should forfeit and lose (to be retained out of their wages) the sum of 10s. 6d. for every act of disobedience; and also the sum of 2s. 6d. per day for lying idle upon each hewer, deputy-craesman, on-setter, sinker, driver, or off-handman, to be deducted as aforesaid; and for every working day which they or any of them so hired and bound as aforesaid should absent themselves from their employment, or should neglect or refuse to fulfil and execute the whole of the business of an usual day's work, unless prevented by sickness or some other unavoidable cause, the defaulters should forfeit and lose (to be retained as aforesaid) the sum of 2s. 6d. for every such default, refusal, or neglect; all which said forfeitures and penalties should be deducted and retained out of the wages or earnings of each offender at the first pay-day next after the offence should be committed. And in the said indenture was contained a proviso, that the indenture should not, nor should any covenant or clause therein contained, be construed to extend to oust or exclude any justices of the peace from any jurisdiction or cognizance which the statute law of this kingdom hath given to such justices over masters and servants; but, on the contrary, that each of the said several parties thereto should be at full liberty, notwithstanding any thing therein contained, upon any breach of any of the before-mentioned covenants, to call for and require the aid and assistance of any justice or justices, to compel the performance, or punish any breach of such covenants, as far as by law they could or might if the said indenture had not been made. And it was further cove-

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The King
against
The Inhabitants
of
Buxton

1823.

The King
against
The Inhabit-
ants of
Bryan.

nanted and agreed, that in case the said *J. P.* should think it necessary, at or about *Christmas*, 1822, to repair, alter, or amend any engines or machines of or belonging to the said colliery, or to remove or prevent any obstructions or hindrance which might have happened to the same, or to do any other thing which he the said *J. P.*, his executors, &c. should think needful to be done in the said colliery, or the working of the same, hat then it should be lawful for him to stop the workings at all or any of the pits of the colliery for any length of time not exceeding in the whole the space of seven days, without paying or allowing any wages or sums of money to any of the several parties who should thereby be prevented from doing their daily work, save and except such of them as should be employed by him in any other work in and about the colliery, or otherwise, who should be paid or allowed reasonable wages for such his or their other work. This indenture was executed by *James Potts* and by *William Gray*, the pauper, together with a great number of other workmen, upon the day it bears date. *William Gray* was retained and hired by the said indenture as a driver. He was at that time under age, unmarried, and without

E. Alderson, in support of the order of sessions. The pauper acquired a settlement in *Byker*. The question here, is very different from *Rex v. Gateshead*. (a) In that case there were several clear exceptions out of the contract. Here, there is nothing of that kind. The service is not limited to any stated number of hours in each day. The question must be decided by this principle, that the exception must be in the contract itself. It will not be an exception if by the custom of the country, or by the custom of a particular trade, or by special leave of the master, the servant works during certain hours only. (b) The clerk in a mercantile house attends during certain hours only; but if he were hired for a year, the hours of rest would not be an exception

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(a) *Rex v. Gateshead*, *E. T.* 2 *G.* 4. — The pauper was, together with many other persons, hired to work in a colliery from the 5th of April, 1813, to the 5th of April, 1814. Amongst other things, it was stipulated that each man should on each working day do such a quantity of work as should be deemed equal to a full day's work, and should not leave the pit until that quantity was completed, or in default thereof should forfeit 2s. 6d. The master stipulated to find work for the men during the whole year, and to forfeit 2s. 6d. for every day that he should oblige them to lie idle, except at the Christmas holidays, which were not to exceed ten days. There was also a proviso, that nothing in the agreement should oust the jurisdiction of the magistrates. The pauper worked for the whole year, including the holidays, except on certain Saturdays called *pay Saturdays*, when the wages were paid, and the men did no work. The justices at sessions held that this hiring and service did not confer a settlement.

Williams, in support of the order of sessions, relied upon *Rex v. Edmond*, 3 *B. & A.* 107., and contended that the agreement between the pauper and his master was merely for a certain quantity of work.

Tindal, contra, referred to the proviso at the end of the agreement to show that the relation of master and servant existed throughout the year.

Per Curiam. That would not authorise the magistrates to interfere contrary to the express contract of the parties. The case is not distinguishable in principle from *Rex v. North Nibley* and *Rex v. Edmond*. The pauper has not stipulated to be under the control of the master for the whole year.

Order of sessions confirmed.

(b) See *Rex v. St. Agnes*, *Burr. S. C.* 671. *Rex v. Birmingham*, 1 *Doug.* 333.

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out of the contract. There are certain implied exceptions in every contract. *Res v. All Saints, Worcester.* (a) Here, the number of hours during which the service was to be performed, was merely introduced as a mode of calculating the amount of the wages. The hiring was general, although the mode of calculating the wages was special; and wages were not to be paid for fourteen hours' service only; if the service were longer, the pauper was to have higher wages. So, also, the retention of part of the wages in case of negligence, was merely for the purpose of enforcing obedience. And besides the forfeiture for absence, there is a special provision, that the jurisdiction of the magistrates shall not be ousted; and they might compel the party to serve. That does not restrain the original unqualified hiring for a whole year. The stipulation as to repairing the engine applies to the master alone, and does not give the servant any power to go away. The master might employ him elsewhere. That, therefore, was not an exceptive hiring, and the service under it was sufficient to confer a settlement. *Res v. Edmond* (b) is distinguishable; for in that case there was a clear stipulation for absence, and leave to serve any other master during severe frost. That, too, was

certain sum for a day's work not exceeding fourteen hours. No magistrate could have compelled the pauper to return to work after the expiration of the fourteen hours. Then, according to *Rex v. North Nibley* (a), that did not confer a settlement. It is no answer to say that the hiring was originally for a year or years; for that was the case in *Rex v. Edgmond*. In that case *Abbott C. J.* says, "I do not see what remedy the master could have had, supposing the pauper to have refused to work after the usual hours." The stipulation in that case for absence during frost, resembles the provision here for the repair of the engine. In this case, it must be admitted, the pauper has not any express liberty to work elsewhere; but if the master chose to turn his men off for a time, they would not be bound to remain idle, but might enter into another service; the cases, therefore, are not to be distinguished. *Rex v. Gateshead* is also in point for the appellants. In that case there were certain forfeitures for absence, and at the end of the agreement a proviso, that nothing therein contained should have relation to the jurisdiction of magistrates in cases of disputes between master and servant. And it was observed by the Court: "The last clause cannot control the express stipulations previously agreed to. That of the servant's leaving his work is contemplated by the parties themselves, who agree, that for any default he shall pay certain fines or penalties. This case is not to be distinguished from *Rex v. Edgmond*." Neither is the present case distinguishable; and if those cases were well decided, the order of sessions must be quashed.

Cur. adv. vult.

(a) 5 T. R. 21.

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The judgment of the Court was, on a subsequent day during the sittings, delivered by

BAYLEY J. The question in this case was, whether the hiring were conditional or exceptive. Many cases of this description are to be found in the books, between which the distinction is rather subtle, and at first sight not easily discovered. Adverting to them all, the proper distinction appears to be this; if the bargain be originally made for an entire year, and terms are introduced applicable to a continuance of the relation of master and servant during the whole year, but there is also a provision, that in a given event it shall be competent to the parties to put an end to, or suspend the service for a part of the year, still a settlement is gained if the service is actually performed for a whole year, and neither party avails himself of the condition. A conditional hiring is, for this purpose, the same as an absolute hiring, unless the condition is acted upon. An exceptive hiring is one by which the relation of master and servant will not subsist for the whole year, unless some further arrangement is entered into; and if by the bargain days or hours are excluded from the service,

any limit upon what might reasonably be required by the master; and that the relation of master and servant continued during the whole twenty-four hours. Upon the forfeitures also, we think that the pauper might not, upon payment of them, be absent if he thought fit, but that they were inserted to enforce regular attendance; and this view of it is confirmed by the clause stipulating that nothing in the contract shall be construed to abridge the power of the magistrates. Another clause has been insisted upon for the appellants; that relating to the repair of the engine. If that was an exception, this was a contract for a year, minus seven days. But we think it a contract for a year, with power to the master to stop the work if he thought fit. Had he done so, the question would have been different; but that is not found. This, therefore, was a bargain for a year with liberty to suspend the service, which constitutes a conditional and not an exceptive hiring. This distinction between conditions and exceptions is consistent with all the decisions. In the cases where a servant having liberty to be absent, has been held not entitled to a settlement, it will be found, either that the servant availed himself of the liberty, or that the time was necessarily excepted out of the original contract. This being a conditional hiring, and the condition not having been acted upon, the pauper gained a settlement in *Byker*. And the order of sessions was therefore right.

Order confirmed. (a)

(a) In *Rex v. Bishops-Hatfield*, 2 Bolt. 211., the pauper was hired for a year, with liberty to let himself for the harvest month to any other person. In *Rex v. Empringham*, 2 Bolt. 217., the hiring was for a year, with liberty to be absent eleven days during the sheep-shearing season. In *Rex v. Arlington*, 1 M. & S. 622., the hiring was for a year, with liberty to be absent during the sheep-shearing season. In *Rex v. Turvey*, 2 B. & A. 520., the

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the hiring was for a year from *Michaelmas*, to go away a month at harvest, and make up the time after *Michaelmas*. In each of these cases the pauper did absent himself according to the liberty reserved in the original contract; and it was held that no settlement was gained by such hiring and service. There are two cases, *Rex v. Westerleigh*, *Burr. S. C. 758.*, and *Rex v. Finchcomb*, 1 *Doug.* 391., which appear to be at variance with those decisions. In each of these two cases the pauper was hired for a year, with liberty to be absent on duty as a militia man for a month, and he accordingly was absent; yet it was held that the hiring and service conferred a settlement. In *Rex v. Over*, 1 *East*, 599., Lord *Kenyon* says, that the ground of those decisions was, that the leave of absence stipulated for was no other than what the law would have compelled without stipulation. In several other cases, it has been held that implied exceptions will not prevent the gaining of a settlement, but that if they are expressed in the contract, they will have that effect. *Rex v. Macclesfield*, *Burr. S. C. 458.* *Rex v. All Saints, Worcester*, 1 *B. & A.* 322. And there appears to be this distinction between them, that notwithstanding the implied exceptions, the relation of master and servant continues during the whole year; whereas that relation has been considered at an end during the excepted periods stipulated for in the contract. *Rex v. Wington*, *Burr. S. C. 280.* But in the cases of the militia men, it seems that the relation of master and servant must at all events have been suspended for the time during which they were out on duty. It seems difficult, therefore, to understand on what principle those cases are sustainable: and see the observations made by the court in *Rex v. Berwick*, 3 *M. & S.* 229.

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house in *Thornhaugh-street*, in the parish of *St. Pancras*, and resided in the same for a period not exceeding nine months, and subsequent to the 2d day of *July*, 1819, at the yearly rent and value of 80*l.*; and during such occupation her said husband was regularly rated by, and paid a poor-rate to, the parish of *St. Pancras*, as such occupier of the said house.

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Cowley, in support of the order of sessions. The 3 & 4 *W. & M. c. 11. s. 6.* enacts, “that any person coming to inhabit in any parish charged with and paying his share towards the public taxes of the said parish, shall gain a settlement.” The paying of taxes was considered by the legislature as equivalent to the notice required by s. 3. in other cases. There can be no doubt, therefore, that, under this section a settlement might be gained by paying rates or taxes for a tenement of any value. The 35 *G. 3. c. 101. s. 4.* enacts, “that no person shall gain a settlement by being charged with and paying his share towards the public taxes or levies of the said parish, for, or on account, or in respect of any tenement, not being of the yearly value of 10*l.*” That section, therefore, in terms, only repeals the sixth section of the statute of *William*, so far as regards the paying of rates and taxes in respect of tenements under the value of 10*l.*, and may be considered as having the same operation as if it was introduced as an exception into the sixth section of that statute. It is perfectly clear, therefore, that a settlement may be gained by the payment of rates, in respect of tenements above the value of 10*l.* It is true, that in *Rex v. The Inhabitants of Islington (a)*,

(a) 1 *East*, 283.

Lord

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Lord *Kenyon* is reported to have said, that it was intended, by the 35 G. 3., to make an end of this head of settlement law in future; but that was an extra-judicial opinion; and in *Res v. Penryn (a)*, Lord *Ellenborough* delivers a similar opinion: but Mr. Justice *Abbott* seems to have considered the operation of the statute to be confined to cases where the rates were paid for tenements of very small value. That decision, however, cannot be supported. There is one case where a person residing on a tenement of more than 10*l.* annual value could not gain a settlement, except by the payment of rates; and that is the case of a servant to the crown, residing in a tenement belonging to the public. (*b*) There he would not gain a settlement by renting a tenement, nor by being an owner; for it was not his own. The 59 G. 3. c. 50. does not affect the question at all, for that is expressly confined to settlements by the renting of tenements.

Barnewall, contra. Before the 35 G. 3. c. 101. passed, the settlement by payment of taxes was never resorted to, unless the pauper rented a tenement of less than 10*l.* a year value. When, therefore, it was enacted, that no

The decision of the Court in *Rex v. Penryn* is an authority expressly in point. And Lord *Ellenborough* delivered a very strong opinion upon the very question now before the Court. The 59 G. 3. c. 50. is also in favour of this construction; for although it appears by its preamble to be confined to settlements gained by the renting of tenements, yet it enacts, that "no person shall acquire a settlement by or by *reason* of dwelling for forty days in any tenement, unless it be held for the term of one whole year, and the rent paid for a year," &c. &c. But if a settlement may be gained in every one of those cases, by paying the smallest sum for rates, although the tenement be not held for a year, and although no rent whatever be paid, a party may be said to obtain a settlement by reason of dwelling in a tenement; and that statute will be virtually repealed.

Cur. adv. vult.

BAYLEY J. The question in this case is, whether the right to a settlement, by being rated, and paying taxes, was still a subsisting right at the time when the pauper was rated and paid, the tenement which he occupied being of the annual value of 10*l.* or upwards. In this case the pauper could not gain a settlement by renting it, because he had not been in the occupation of it for the period of one whole year, as required by the 59 G. 3. c. 50. In order to decide the question, we must advert to the 35 G. 3. c. 101. s. 4., which enacts, that "no person or persons whatsoever, who shall come into any parish, township, or place, shall gain a settlement in such parish, township, or place, by being charged with and paying his, her, or their share towards
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the public taxes of the said parish, &c. for, and on ac-
count, or in respect of any tenement or tenements, not
being of the yearly value of 10*l*.;" and it has been
contended, that this head of settlement was entirely
put an end to by that clause. It is material to con-
sider what was the law upon this subject before the
35 G. 3. c. 101. passed. A person rated and paying
taxes for a tenement, whatever might be its value, ac-
quired a settlement. The parish in such case was con-
sidered as having adopted him as one of their parish-
ioners. In most instances, where the tenement was of
the yearly value of 10*l*., the occupier would obtain a
settlement upon other grounds. In the course of the
argument, however, one instance was referred to, in
which a party occupying such a tenement would not
acquire a settlement, unless on the ground of paying
rates. I allude to the case of a person living in a house
belonging to the king, as a servant of the public. The
words of the clause to which I have referred do not, in
terms, import an intention of the legislature to abolish
this head of settlement entirely. They are qualified,
and apply expressly to tenements not being of the yearly
value of 10*l*.. And before we give a general effect to

and are certainly at variance with the opinion of the Court. In the former, however, the point did not arise, and the opinion of Lord *Kenyon* was quite extra-judicial. The real question was, whether the operation of the 35 G. 3. c. 101. s. 4. was limited to persons who should thereafter come into any parish, or whether it extended to persons residing there before. In *Rex v. Penryn*, the question was again presented to the consideration of Lord *Ellenborough*, who certainly gave a distinct opinion, that it was the intention of the legislature to abolish entirely this head of settlement. The present Lord Chief Justice merely said, "that it was expedient to do away settlements by paying rates for tenements of very small value." It does not appear by the report whether my Brother *Holroyd* or myself were present. These two authorities naturally drew the attention of the Court carefully to consider the words of 35 G. 3., and the state of the law as it existed before the passing of that act. If there had been no case before that time in which the occupier of a tenement of 10*l.* annual value would gain a settlement by the payment of rates, and on that ground only, then perhaps the words of the statute might be construed to have a general operation, and to annihilate this head of settlement altogether. One instance, however, has been mentioned, and possibly there may be others, where, before the statute 35 G. 3. a settlement could not be acquired at all by the occupier of such a tenement unless by the payment of rates; and that being so, I think that we are not warranted in saying that these qualified words were intended by the legislature to have a general and unqualified operation so as to abrogate entirely this head of settlement. It might perhaps be imagined, when the 59 G. 3. c. 50. passed,

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that this head of settlement no longer existed; and we have avoided delay in giving our opinion, that if such were the notion, the error may be remedied during the present session of parliament.

Order of sessions confirmed. (a)

(a) The sole object of the legislature in passing the 35 G. 3. c. 101. was to take away the power of removing poor persons likely to become chargeable, and to make them irremovable till actually chargeable. But in doing this, it became necessary to guard against certain evils which this change would produce to parishes. For instance, by the old law, a person coming into a parish, and giving a written notice to the overseers, would, if he resided forty days, gain a settlement. The reason of this being, that if likely to be chargeable, the overseers, availing themselves of the knowledge thereby communicated, might remove him. But when the law was altered, and actual substituted for probable chargeability, it would follow that a person very likely to become chargeable might, if he was desirous of doing so, come in and give notice, and, in defiance of the overseers, acquire a settlement by only not demanding relief for forty days. In order to remedy this evil, settlement by notice was abolished by sect. 3. So, again, if a person came to settle on a tenement under 10*l.*, he would, by the old law, be removable if likely to become chargeable; but if he was rated, and paid rates in respect of it for forty days, and was not, during that time actually chargeable, he might become settled in the parish, and demand relief on the forty-first day. For this reason, such persons rated in respect of tenements under 10*l.*, were prevented by sect. 4. from gaining settlements by paying rates. Similar reasons may be given for the two remaining enactments in the fifth and sixth sections. The whole may be thus summed up. wherever the change of the law from probable to

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UPON appeal against an order of two justices, where-
by *John Garfield*, his wife and children, were re-
moved from the parish of *Geddington*, in the county of
Northampton, to the parish of *Dunton Bassett*, in the
county of *Leicester*; the sessions quashed the order, sub-
ject to the opinion of this Court on the following case.

In *November*, 1814, the pauper, *John Garfield*, being
then resident in the parish of *Geddington*, entered into
a written agreement with one *Richard Nason*, by which
the latter agreed to sell to *Garfield*, all that messuage,
&c. situate at *Dunton Bassett*, in the county of *Leicester*,
therein described, at or for the price of 310*l.*, to be paid
as follows; the sum of 160*l.* on the 30th day of *Novem-*
ber instant, and the sum of 150*l.* on the 24th *June* next,
with interest for the same, after the rate of 5*l.* for 100*l.*
for a year from the date of the agreement. And *Nason*
agreed at his costs to make out a good marketable title
to the premises, and to convey the same at the costs of
Garfield on the 24th *June* next, on payment of 150*l.*
with interest. And *Garfield* agreed with *Nason*, to pay
to him on the said 30th *November* instant, the said sum
of 160*l.*, and also the further sum of 150*l.* with interest
on the said 24th *June* next, on having the premises
thereby agreed to be sold conveyed to him, *Garfield*.

A written agreement was made for the purchase of an estate, to be paid for by two instalments; the first was to be payable within a few days after the signing of the agreement, and the last after the expiration of seven months. The vendor was to make out a good title on the payment of the last instalment, and to convey the premises; but the purchaser was to be let into possession upon the payment of the first instalment. The purchaser paid the first instalment, and was let into possession, and continued in possession for a year and a half, but the last instalment was never paid, nor any conveyance ever executed; and the pur-

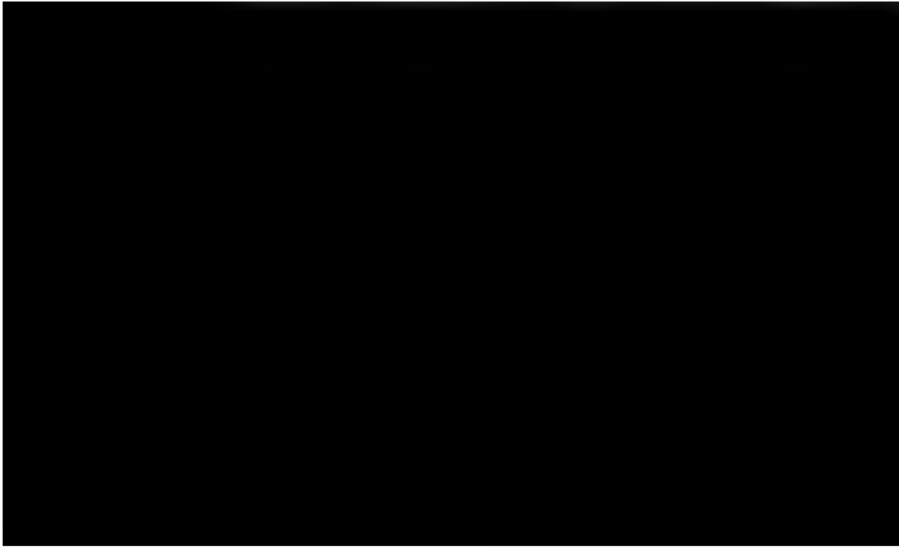
chaser afterwards gave up the contract upon receiving back part of the first instalment: Held, that under this contract, the purchaser did not acquire an equitable estate, so as to give a settlement under the 9 G. 1. c. 7. s. 5.

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And on payment of the sum of 160*l.* *Garfield* was to be let into the possession of the premises; but in case default should be made by him of payment of the 160*l.*, the agreement was to be void, and *Nason* was to be at liberty to sell the premises on the 5th *December* next. The sum of 160*l.* was paid on the day appointed, and full possession then given by *Nason*, and the pauper resided in the house in *Dunton Bassett* for a year and a half, and upwards, immediately subsequent; but he never paid the 150*l.* so agreed to be paid on the 24th *June*, nor was any conveyance ever executed. An action at law was brought by *Nason* for the 150*l.*; but afterwards by an agreement between the parties the same was discontinued; *Nason* paying the costs and returning to the pauper 30*l.* of the said 160*l.*, and the pauper agreeing to give up the contract and the possession, which was accordingly done.

Reader, Adams, and Holbeach. The pauper did not gain any settlement in *Dunton Bassett* by the occupation of the premises contracted for; for he had no legal or equitable estate in them: not having paid the full consideration-money, a court of equity would not have decreed



don (a), *Rex v. Toddington* (b); *Rex v. Horndon-on-the-Hill* (c), and *Rex v. Hagworthingham*. (d) It may be said that he acquired an interest in the lands from November to June, and that that is sufficient to give a settlement, but it is not found in the case that that possessory right was of the value of 30*l.*; and, therefore, no settlement could be gained under the stat. of 9 G. 1. by forty days' residence on it, *Rex v. The Inhabitants of Martley*. (e) And it is clear that he did not gain a settlement under the 13 & 14 Car. 2. c. 12., because he did not come to settle on the property in the character of tenant. *Rex v. St. John's, Glastonbury*. (f)

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Nolan, Marriott, and Amos, contra. The agreement was for a present purchase at the time when it was signed, and was not to remain in fieri until payment of the purchase-money. The equitable title is complete when the thing is agreed to be done. Here, therefore, it was complete from the moment when possession was given under the contract; although it might be defeasible on non-payment of the purchase-money. This is not a licence which is personal, but an assignable interest. They cited *Wall v. Bright* (g), *Knollys v. Shepherd* (h), *Payne v. Meller* (i), *Douglas v. Whitrong* (k), *Townley v. Bedwell*. (l) [Hollond J. If you shew that the vendor and vendee stood merely in the relation of trustee and cestui que trust, then the latter would have an equitable estate; and would gain a settlement. But none of the cases cited

(a) 2 M. & S. 461.

(c) 4 M. & S. 562.

(e) 5 East, 40.

(g) 1 Jac. & Walk. 494.

(i) 6 Ves. 349.

(l) 14 Ves. 591.

(b) 1 B. & A. 560.

(d) 1 B. & C. 634.

(f) 1 B. & A. 481.

(h) Cited 1 Jac. & Walk. 499.

(k) 16 Ves. 253.

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shew that a court of equity would, under the circumstances of this case, consider the estate to belong to the vendee as he failed to pay the residue of the purchase-money.] [*Bayley J. Rex v. Long Bennington*(a) seems to be precisely in point. There the pauper agreed by parol to buy a copyhold for 150*l.* He paid 34*l.* and entered into possession, in part performance of the contract, and continued near six months; the contract was then rescinded, because the seller would not give an indulgence he had promised for the residue of the purchase-money, and the seller returned the pauper 14*l.* The question was, whether this gave a settlement? The sessions thought it did; but this court held otherwise: for the pauper had purchased no estate or interest in this land; he could have made no claim in equity without paying the remainder of the purchase-money; and though an equitable estate is sufficient to confer a settlement, a questionable right to go into a court of equity is not.] There the agreement was by parol, and no time was fixed for the payment of the purchase-money. The payment of the purchase-money will not, in equity, take a parol agreement out of the statute of frauds, *Clinan v. Cooke* (b); and the deliverance of possession was a part

Fullongley (a), Rex v. Offchurch (b), Rex v. Cold Ashton (c), Rex v. Edington. (d)

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BAYLEY J. In cases relating to the law of settlement, the manner of determining any particular point is not so important, as it is that the decisions should be uniform and consistent. For as that law is administered gratuitously by a most respectable and meritorious body of magistrates, whose habits and duties are not likely to make them acquainted with the nice distinctions of the courts of equity, it is desirable that they should have cases settled upon plain grounds for their direction, rather than that they should be called upon to entertain and decide difficult questions of equitable law. The question in this case arises on the 9 G. 1. c. 7. s. 5., by which it is enacted, “that no person shall be deemed to acquire or gain any settlement in any parish, for or by virtue of any purchase of any estate or interest in such parish whereof the consideration for such purchase doth not amount to the sum of 30*l.*, bonâ fide paid.” There must, therefore, either be an estate or interest PURCHASED; and by the latter word I understand a definite interest, for which the party contracts at the time of making the contract. If the question raised were *res integra*, I should be disposed to hold that the legislature meant a legal interest only. It has been decided, however, that a cestui que trust has a sufficient interest in land to gain a settlement under this statute, and I feel bound to adhere to those decisions; but there may be a distinction between an equitable estate and a mere equitable right, and that is adverted to by my Brother *Holroyd*, in the case of *Rex v. Todding-*

(a) 2 T. R. 709.

(b) 3 T. R. 114.

(c) Burr. S. C. 444.

(d) 1 East, 288.

CASES IN TRINITY TERM

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of the Hospital
of St. Thomas.

103. (a) The case of *Res v. Long Bennington* is expressly in point with the present, and shews, that in cases of constructive trusts, a settlement is not gained by the cestui que trust. The agreement there, indeed, was by parol, but that circumstance formed no ingredient in the judgment of the court. The principle of the decision was, that a court of law, perhaps in ignorance of what a court of equity would do under the circumstances, held that it was not the case of a mere naked trustee and a cestui que trust; for, until the payment of the full purchase-money, the vendor had a beneficial interest, and was something more than a trustee; and therefore that no settlement was gained. There is one distinction between the two cases. In the case cited it does not appear when the residue of the purchase-money was to be paid; whereas in this case part was paid on the 30th November, and the residue was to have been paid on the 24th June. And it is said, that during the interval the pauper was irremovable; but I think he was not irremovable till the 24th June, because it was his own estate, either at law or in equity, until he or tendered the residue of the purchase-money that being so, I am of opinion that there was no settlement gained in *Dunton Bassett*, and, therefore, he confirmed.

gained, so as to give a settlement, is a very different question. The cases which have been cited shew, that where the vendee has performed the contract in part, and has offered to pay the remainder of the purchase-money, the vendor then becomes a trustee for the vendee, and a court of equity will compel a specific performance. The case of *The King v. Long Bennington* seems to me to have been properly decided, and to govern the present. There, indeed, the contract was by parol, and it did not appear that the vendee was to have possession for a specific period of time; but these distinctions were not relied upon. Here, time is given till *June*, when the residue of the purchase-money is to be paid; and it is agreed that the vendee should have possession till that time. The effect of which is merely this, that it might or might not amount to a demise for that time; but there is not sufficient found in the case to shew that there was a renting of a tenement of 10*l.* annual value. But it is said, that at all events there was a purchase of an interest for six months; it does not, however, appear how much was to be paid for that, or that the pauper, in purchasing that, acquired an interest in land to the value of 30*l.* If the contract was rescinded by the fault of the vendor, it is questionable whether any thing could be recovered for the possession during the six months. For these reasons I think that no settlement was gained in the parish of *Dunton Bassett*.

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The KING
against
The Inhabit-
ants of
GEDDINGTON.

BEST J. It has long been settled that an equitable estate will satisfy the words *any estate or interest* in the 9 G.1.; but it must be a clear and absolute equitable estate; such an estate as a court of equity would put the person claiming it into the complete pos-

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against
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ants of
Geddington.*

session of, and protect him against any attempts to disturb his enjoyment of it. A court of equity could not give possession to a purchaser who had not paid the purchase-money, or keep him in possession if he were put in against the legal claim of the vendor. Such a purchaser has only an inchoate right, which is not rendered a perfect equitable estate until he has paid all that he has stipulated to pay. Where purchasers have been ready to pay the price, and tendered it to the vendor, cases have occurred in which very nice questions have arisen, whether they are entitled to a conveyance. The business in which we are occupied in this court does not qualify us for the decision of such points. But if we are incompetent, how much more so must those be who compose the courts of quarter sessions; and these things cannot be submitted to us until they have first been decided upon by them. I say, therefore, with my Brother *Bayley* in the case of the *The King v. Horn-don-on-the-Hill*, "we cannot know how a court of equity will deal with such a case;" and that I do not see that the pauper had any equitable estate, certainly not such a perfect one as confers a settlement.

Order confirmed.

trading person, going to other men's houses, &c.; and being such person, did, on the day aforesaid, at *Cromer*, carry to sell, and expose to sale, divers goods, wares, &c., to wit, a quantity of shoes, and was then and there found trading *without any licence* so to do; whereupon he was summoned, &c., and the justice did convict him of the said offence, and adjudge that he had forfeited the sum of 10*l*. The sessions, upon an appeal, quashed the conviction, subject to the opinion of this Court, upon the following case. It was fully proved, on behalf of the appellant, that he was a shoemaker, and that he was the real worker or maker of the said shoes, which he "carried to sell and exposed to sale;" but as it appeared from the evidence that *Cromer* was not a mart, market, or fair, nor a city, borough, town corporate, or market town, the Court were of opinion that the conviction was good, although the words "or elsewhere," omitted in the 50 G. 3. c. 41., are in the 9 & 10 W. 3. c. 27. But it was objected, on behalf of the appellant, that the conviction was bad in point of form. First, because in setting forth the offence, it was not stated that the shoes were not of the manufacture of the appellant; and, secondly, because the conviction was under s. 20. of the 50 G. 3. c. 41.; and that therefore the penalty adjudged (if any) should have been 40*l*., and not 10*l*. And on these grounds the conviction was quashed.

Cooper, in support of the order of sessions. The defendant was not liable to any penalty, for the sessions have found that he was the manufacturer of the articles which he offered for sale; he was, therefore, protected by the ninth section of the 9 & 10 W. 3. c. 27., by which it was enacted, "that that act should not extend to prohibit the real workers or makers of any goods or
wares

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against
Wensdell.

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against
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wares within the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*, from carrying abroad, exposing to sale, or selling any of the said goods of their own making, in any public marts, fairs, markets, or elsewhere." That act was not altogether repealed by the 50 G. 3. c. 41., but merely as to the duties. The defendant was therefore justified in selling the articles in question at *Cromer*, although it is not a market town, the words "or elsewhere" in the 9 & 10 W. 3. being sufficient to authorise the sale of goods by the manufacturer in any place whatsoever. But secondly, if the defendant was liable to any penalty, it was a penalty of 40*l.*, imposed by the twentieth section of the 50 G. 3. c. 41. The seventeenth section of that act, which imposes a penalty of 10*l.*, is plainly intended to apply to persons who have taken out a licence, but trade contrary to the terms of it, or without having it upon their persons; and the twentieth section, which applies to persons trading as hawkers and pedlars without a licence (which is the offence stated in the conviction), imposes a penalty of 40*l.*, and does not give the convicting magistrate any power to mitigate it. It cannot be contended that the seventeenth and twentieth sections

point. The sum of 40*l.* appears to have been inserted in the twentieth section by mistake, and convictions have always proceeded on the seventeenth section. It is urged for the defendant, that that section applies to those cases only where a licence has been taken out, and the party trades without or contrary to it; but *Rex v. Turner* (a) furnishes an answer to that argument. That was a conviction under the seventeenth section, and both *Abbott* C. J. and *Holroyd* J. observe, that the conviction was not for trading contrary to a licence, but without any licence at all. The seventeenth section has, therefore, been considered to apply where the party has not any licence, as well as in those instances in which he neglects to carry it with him or refuses to produce it. The latter provision was necessary, in order that it might be ascertained whether the mode of trading was authorised by the licence taken out. At all events it is not plain, upon this conviction, that the defendant had not a licence. It may mean that he was trading without having the licence about his person, and not that he had neglected to take one out, as required by the 6th section.

132*s.*

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against
WESDELL.

BAYLEY J. There is much obscurity in the 50 G. 3. c. 41.; nor is it found there for the first time. It has existed from the passing of the 29 G. 3. c. 26. The eleventh and fourteenth sections of that act are in terms the same as the seventeenth and twentieth sections of the 50 G. 3. c. 41.; and in both these acts the same difficulty occurs as to imposing a penalty of 10*l.* or 40*l.* It has been contended that a person trading without a licence is liable to the penalty of 40*l.*, imposed by the twentieth section, and is not within the seven-

(a) 4 B. & A. 510.

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teenth section, which imposes a penalty of 10*l*. If that were clear, the conviction in a penalty of 10*l*. would be bad ; but the meaning of the act should be quite plain, to induce us to come to such a conclusion, for if there be a doubt we should adopt that construction which will bear with the least hardship on the party convicted. In the seventeenth section there are three propositions : " If any such hawker shall trade *without, or contrary to, or otherwise than as shall be allowed by* such licence, he shall forfeit 10*l*." It does not say, such hawker " having obtained a licence," and trading, &c. There are not then any words confining the operation of that section to a person having obtained a licence ; and the fair meaning of the words, " shall trade without such licence," appears to be, " shall trade without having obtained a licence." In *Rex v. Turner* this objection, if good, would have been decisive ; yet it was never suggested, and in practice convictions are always for 10*l*. In the last edition of *Burn's Justice* a form is given in which the penalty is 10*l*. ; and that is worthy of consideration, although it cannot be treated as an express authority. For these reasons I think that the words in the seventeenth section, " trading without such licence," are not

and the 29 G. 3. c. 26., which imposed a higher duty, contained the same prohibitory clause as the 9 & 10 W. 3. That being general would have entirely repealed the exemptions in the former act; but then a new proviso is introduced, differing essentially from that in 9 & 10 W. 3. c. 27., for the words, *or elsewhere*, are omitted. A similar proviso was introduced into the 50 G. 3. c. 41.; and it is manifest that the words, *or elsewhere*, were omitted because the legislature thought them too large. I am therefore of opinion, that as the prohibition in the 50 G. 3. c. 41. is general, and the exempting clause confined to marts, markets, fairs, cities, boroughs, towns corporate, and market towns, the defendant was not justified in selling the articles in question in a place not coming within that enumeration.

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BEST J. (a) The act in question is certainly very obscure, but I think that both points must be determined against the defendant. As to the first, viz. the right of a manufacturer to hawk his own wares; when the 9 & 10 W. 3. c. 27. was passed the legislature intended that a manufacturer should be allowed to sell his own goods any where; but the same indulgence was not extended to them by the 50 G. 3. c. 41. That limited their privileges to certain places. It has been said that the 9 & 10 W. 3. c. 27. is only repealed as to the duties; but s. 31. of the 50 G. 3. c. 41. shews that every provision of the former act, which would be inconsistent with the latter, was intended to be repealed. But that argument is unnecessary, for the 50 G. 3. c. 41. imposes new duties; and a person not having the licence thereby required cannot hawk at all, except in those

(a) Holroyd J. was sitting at the Old Bailey.

places,

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against
Widdowall.

places, and under those circumstances, particularly provided for by that act. As to the other point, it certainly appears difficult to reconcile the seventeenth and twentieth sections of the act. But I think that the defendant was at all events guilty of an offence against the seventeenth section, and was therefore liable to be convicted in a penalty of 10*l*.

Order of sessions quashed, and conviction confirmed. (a)

The KING against M^cGILL.

A person exposing to sale and selling tea, as a hawker, without a licence, is liable to the penalty imposed by the 50 G. 3. c. 41. upon hawkers trading without a licence; although, even with a licence, he would be liable to a penalty for selling tea in an unen-

THE defendant was convicted under the 50 G. 3. c. 41. s. 17. for hawking tea without a licence. The conviction stated, that on, &c. at, &c. the defendant was charged with being a hawker, &c., carrying to sell, and exposing to sale, without any licence so to do, certain goods, to wit, divers parcels of tea; and that he being such person, did, on the day and year aforesaid, at *Worcester*, carry to sell, and expose to sale, divers parcels of tea, and was then and there found trading as aforesaid, without any licence so to do. The conviction then

to him one of the said packages containing a quarter of a pound weight of tea; and afterwards on the same day, *G. M'Gill*, as such agent, carried to sell, and exposed to sale, at the house of one *W. P.*, another package containing also a quarter of a pound weight of tea, but did not then and there sell the same. At the several times when he, the said *G. M'Gill*, as such agent, so carried to sell, and exposed to sale, the said first-mentioned quarter of a pound of tea, neither he, nor *D. S.*, his employer, had any hawkers' licence according to 50 G. 3. c. 41.

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Pearson and *Oldnall Russell*, in support of the order of sessions. The objections which will be urged against the conviction are, first, that the defendant was only an agent; and, secondly, that as a hawker, cannot lawfully sell tea, even with a licence, he is not liable to punishment for selling it without one. As to the first objection, *Rex v. Turner (a)* is a decisive authority that agents are liable. With respect to the second point, if a party be charged with trading as a hawker without a licence, it is no answer to say, that by the same act he offended against another statute also; for a man may by one act commit several misdemeanors. [*Best J.* If an unqualified person kill game without taking out a licence, he is liable to a penalty for so doing, although a licence would not protect him from the penalty imposed upon unqualified persons.] That argument is conclusive against the defendant.

Denman and *Winter*, contra. It must be conceded, on the authority of *Rex v. Turner*, that agents are liable

(a) 4 B. & A. 510.

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to a penalty for hawking without a licence. But a person cannot properly be convicted of doing that as a hawker, which by law he cannot do *as such*. By the 53 G. 3. c. 41. a licence is to be taken out to enable the person to trade as a hawker, and a penalty is imposed upon those who trade as hawkers without one. The legislature must have intended to impose that penalty in those cases only where the party has dealt in some of those things the sale of which is authorised by the licence. But by the 12 G. 3. c. 46. s. 6. a penalty of 10*l*. is imposed upon every person selling tea in an un-entered place; and the 9 G. 2. c. 35. s. 20. made it unlawful for any hawker or pedlar to sell tea. It is clear, therefore, that a hawker's licence would not legalize the sale of tea by a person trading as hawker. The defendant then should have been convicted under the 12 G. 3. c. 46. s. 6.; and not under the hawkers and pedlars' act, 50 G. 3. c. 41.

Cur. adv. vult.

The judgment of the Court was, on a subsequent day during the sittings, pronounced by

has been confirmed by a further consideration of the subject. As to the first point, it was argued, that inasmuch as one act of parliament had made it illegal to sell tea in any but an entered place, and another had provided that no hawker should sell tea; that, therefore, a hawker was not liable to a penalty for exposing it to sale without a hawker's licence. If the 50 G. 3. c. 41. had been the first act upon the subject, and no penalty had previously existed for trading as a hawker without a licence, there might, perhaps, have been some doubt whether it extended to any cases in which a licence would not have legalized the sale; but looking at the whole series of enactments relating to hawkers and pedlars, and taking into consideration the time when they were first prevented from selling tea, it will be plain that they are still liable to a penalty for selling it as hawkers without a licence. The first enactment respecting them was the 8 & 9 W. 3. c. 25. (a), which is nearly the same as the 9 & 10 W. 3. c. 27., and contains two clauses material as to the amount of the penalty to be imposed. The 17th section of the 50 G. 3. c. 41. has this provision, "that if any such hawker shall trade as aforesaid, without, or contrary to, or otherwise than as shall be allowed by, such licence, such person shall, for every such offence, forfeit the sum of 10*l*." Three terms are there introduced, "without," "contrary to," or "otherwise than as shall be allowed by," such licence; and it will hereafter appear, that those terms were advisedly introduced to apply to three descriptions of offences. Section 20. enacts, that any person may seize

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(a) Not printed at length in the quarto edition, but in the folio edition published by order of the House Lords.

CASES IN TRINITY TERM

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any such hawker found trading without a licence, or, who being found trading, shall refuse to produce a licence, and have him carried before a magistrate, who is thereby authorised to convict the person so charged, and by warrant under seal to cause the said sum of 40*l.* to be levied. Now, that section does not expressly impose any penalty; and the 17th section, to which it apparently refers, has a penalty of 10*l.*, and not 40*l.*: it is, therefore, fair to suppose that the sum in the 20th section should have been 10*l.*, and not 40*l.*, and that the latter sum was inserted by mistake; and an examination of the earlier statutes on this subject will show clearly that such was the fact. The 19th section imposes a penalty of 40*l.* upon any person trading with a borrowed licence, or one that does not contain his real name. The 8 & 9 W.3., and 9 & 10 W.3. c.27., had not any such clause; the 2d section of the latter imposed a penalty of 12*l.* upon hawkers trading "without," or "contrary to," such licences as the first section requires them to take. The 26th section imposes a penalty of 50*l.* for travelling with a forged licence; and the 8th section authorises the apprehension of hawkers travelling without a licence, contrary to the act, and directs that they shall be taken before a magistrate, who, if the offence be proved, shall convict them, and cause the sum of 10*l.* to be levied.

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in the meantime some alteration was made in the law as to the sale of tea and cambrics. The 10 G. 1. c. 10. s. 14. provided, that tea should not be sold except in an entered place. By that provision the right to sell it was made local; the 9 G. 2. c. 35. s. 20. enacted, that it should not be sold by any hawker and pedlar. The object of the statutes before cited, more particularly applying to hawkers and pedlars, appears to have been to protect domiciled tradesmen; of the two latter, to assist the collection of duties. The effect of them is, not to destroy the former prohibition against trading as a hawker without a licence, but to add a cumulative penalty for hawking tea, even with a licence; for the two provisions are consistent, and may well stand together. The first imposes a penalty upon persons trading at all as hawkers without a licence; the second imposes a penalty upon the sale of tea by hawkers, even with a licence; and, therefore, a person who exposes tea to sale as a hawker, and has no licence, offends against both the above-mentioned provisions, and is liable to a penalty for each breach of the law. The 7 G. 3. c. 43. s. 7. made cambrics found in the possession of any hawker or pedlar liable to forfeiture. Then came the 25 G. 3. c. 78., as to hawkers and pedlars, the fourth section of which resembles the third of the 9 & 10 W. 3. c. 27., but has this difference: the penalty was before confined to persons trading "without" or "contrary to" the licence; this enactment has the additional words "or otherwise than as shall be allowed by" such licence. That expression could only be applicable to those cases in which a licence would not legalize the trading. The 25 G. 3. c. 78. s. 4. alters the penalty from 12*l.* to 10*l.*; and between the fourth section, which corresponds to the third

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section of the 9 & 10 W. 3., and the seventh section, which corresponds to the eighth section of the former act, introduces in s. 6. a provision, that persons trading with a borrowed licence shall be liable to a penalty of 10*l*. In the seventh section, which, as in the former act, refers to the first penalty of 10*l*., the expression *said sum* of 10*l*. is retained. The 25 G. 3. c. 78. was repealed by the 29 G. 3. c. 26., which, however, contained most of the same provisions. Thus the eleventh and fourteenth sections of the latter correspond with the fourth and seventh of the former; the thirteenth section also of the latter corresponds with the sixth section of the former, except as to the amount of the penalty, which was raised from 10*l*. to 40*l*.; and this shews how the mistake in the fourteenth section arose. In the 25 G. 3. c. 78. two penalties of 10*l*. had been imposed in different sections preceding that in which the justice is directed to cause the *said sum* of 10*l*. to be levied. In the 29 G. 3. c. 26. one of those penalties was increased to 40*l*.; and it must have been erroneously supposed that the expression *said sum* referred to that penalty which was raised, and not to that for trading without, or contrary to, or otherwise than as allowed by, the licence, which still remained

the sale of *any* goods, wares, &c. without a licence. For these reasons, we think that the conviction was right.

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against
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Order of sessions confirmed.

CLARK, Administratrix of JOHN CLARK, *against*
HOUGHAM.

ASSUMPSIT for money had and received to the use of *J. Clarke*, in his lifetime, and to the use of plaintiff *as administratrix*, since his death. Pleas, first, general issue; secondly, non assumpsit *infra sex annos*. Replication, that he did promise within six years. At the trial before *Richards C. B.*, at the last spring assizes for *Kent*, it appeared that the action was brought to recover the sum of 330*l.* paid to the defendant under the following circumstances. In 1802 the deceased and several other persons respectively became tenants to the defendant of several parcels of land, all of which were let at the same time at a public meeting. After the rent had been agreed upon the defendant said he would pay all the rates, and the tenants should reimburse him, as he did not wish the assessment to be disturbed. This was agreed to; and from that time to 1816 the defendant paid the rates of the several farms, and every year, before the rent-day, sent to *Clark* and the other tenants an account of what would be due for rent, rates, &c. In those accounts the rates were calculated on a

A., by means of a misrepresentation, received of *B.* and several other persons, his tenants, various sums of money, to which he was not entitled. *B.* applied to him to have the money which he had so paid returned, saying that he and the other tenants had been induced to pay more than was due. *A.* replied, that if there was any mistake it should be rectified: Held, that this obviated the statute of limitations as to payments made by the other tenants as well as by *B.* Plaintiff, an administratrix, after the death of the intes-

ate, made one such wrongful payment as before mentioned, out of the assets: Held, that she might recover it in her representative character.

Upon a replication, that the defendant did promise within six years, to a plea of the statute of limitations, fraud in the defendant cannot be set up as an answer to the plea.

Quere, Whether it would be a good answer if specially replied?

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supposed rental of 3*l.* 10*s.* per acre, and *Clark* always paid the amount demanded. The rates actually paid by the defendant were calculated on a rental of 1*l.* 10*s.* per acre. In *September*, 1816, *J. Clark* died; and at *Michaelmas*, in that year, the plaintiff, who had not then (but has since) obtained letters of administration, settled the defendant's account upon the same terms as before; the sum overpaid by her was 42*l.*, and that was within six years before the commencement of the action. It appeared that none of the tenants knew that they were paying the defendant a larger sum for rates than he actually paid; until after all the payments above mentioned had been made. In order to take the payments by deceased out of the statute of limitations, one *Wilds* was called as a witness, who became a tenant to defendant at the same time and upon the same terms as *J. Clarke*, and continued so for thirteen years. Within six years before the commencement of this action *Wilds* went to the defendant, and said, that he and other tenants had been paying much higher rates and cesses than they had a right to do: that defendant had charged them upon a rental of 3*l.* 10*s.* per acre, whereas the rates were assessed upon a rental of 1*l.* 10*s.* per acre. The de-

pay him; and he refused to return the money overpaid by *Wilds*. Before these conversations *Wilds* had mentioned the matter to several of the defendant's tenants, who authorised him to speak for them; but he had not then had any communication with the plaintiff. It was objected for the defendant, that this evidence was not sufficient to take the case out of the statute: first, because so far from being a promise to pay, the defendant said he knew little about the matter, and absolutely refused to pay; secondly, because the supposed promise was not made to the plaintiff or her authorised agent. With respect to the money paid by the plaintiff it was objected, first, that it was not paid by her as administratrix, because she had not then obtained letters of administration; and, secondly, that she could not recover it back in her representative character; because if a wrongful payment, it was a *devastavit*, for which she was responsible to *J. Clarke's* estate, and she could recover the money in her individual capacity only. The Lord Chief Baron reserved the points. The defendant then gave evidence to shew that the rates were calculated according to an agreement made with the tenants at the time when the land was hired by them; and the steward's books were produced, by which it appeared that the rates had always been calculated upon a rental of 3*l.* 10*s.* per acre. That was left to the jury; and the plaintiff having obtained a verdict for 330*l.*, the whole sum overpaid by *J. Clarke* and the plaintiff. In *Easter* term a rule was obtained to enter a nonsuit, or have a new trial, or reduce the damages to 42*l.*, the sum overpaid by the plaintiff, on the grounds urged at the trial.

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 against
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Comyn (with whom was *Gurney*) now shewed cause. There is not any ground for disturbing the verdict

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which has been found in this case. It was fairly left as a question to the jury, whether the over-payments were made under such circumstances of misrepresentation as entitled the plaintiff to recover. The first point reserved is, whether the claim was barred by the statute of limitations. If the transaction was fraudulent, the statute does not apply, if the discovery were within six years before the action brought. *South Sea Company v. Wymondsell* (a), *Bree v. Holbech*. (b) Or, at all events, the conversation with *Wilds* is an answer to the plea. As to the other objection, the money was paid out of *J. Clarke's* assets, and when recovered would go to his estate; the plaintiff might therefore sue in her representative capacity.

Marryat and Bolland, contra. The letters of administration were not granted to the plaintiff until after the payment was made by her. That rent became due at *Michaelmas*, 1816, and the intestate died before that time; the rent, therefore, was due from the plaintiff in her individual capacity. [*Bayley J.* She might have been sued for it as administratrix or as executrix *de son* *test*. At all events the over-payment was made by her.]

money must be paid in the representative character, in order to enable the party to recover it in that character. *Webster v. Spencer* (a) is not against this. That case merely decided that an executor might lend money without being guilty of a devastavit, which principle is also to be found in *Brown v. Litton*. (b) Then as to the statute of limitations, although it has been held in equity not to apply to cases of fraud and trust until the fraud is discovered; yet at law the rule is otherwise. *Battley v. Faulkner* (c), *Short v. McCarthy*. (d) [Best J. But here the party has been active in concealing the original fraud within six years.] That question must, at all events, be raised by a special replication. In the absence of that, the question rests upon the evidence of *Wilds*. Now the defendant referred him to P., who, instead of admitting any mistake, said he knew nothing about it; and then the defendant, instead of making a promise, absolutely refused to repay the money. In the first place, therefore, there was no promise; and if there were, it was not made with reference to the claim of the present plaintiff.

Comyn cited *Mountstephen v. Brooke* (e), to shew that an acknowledgment made to a third person is a sufficient answer to the statute of limitations.

BAYLEY J. The question, how far fraud may prevent the operation of the statute of limitations, does not properly arise in this case. On the form of replication

(a) 3 B. & A. 360.

(b) 1 P. W. 141.

(c) 3 B. & A. 288.

(d) 3 B. & A. 626.

(e) 3 B. & A. 141.

adopted,

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adopted, the only question is, when did the cause of action accrue? In order to take advantage of the fraud, there should have been a special replication. On the other ground, the point is quite clear. The statute of limitations is a bar, on the supposition, after a certain time, that a debt has been paid, and the vouchers lost. Wherever it appears by the acknowledgment of the party that it is not paid, that takes the case out of the statute. *Leaper v. Tutton* (a), *Dankwait v. Tibbott*. (b) And according to those cases, it makes no difference, whether the acknowledgment be accompanied by a promise or refusal to pay. *Mountstephen v. Brooke* shews that an acknowledgment to a third person is sufficient. Upon the evidence, then, it appears, that in 1802 the defendant had land to let, and did let it to various persons, upon certain terms. After the agreement was made as to the rent, he took upon himself to pay the rates. From that time a paper was delivered to each tenant, shortly before each rent-day, shewing what was the amount of his rent and taxes. *J. Clarke* paid the sums demanded during his lifetime, and the plaintiff made one payment after his decease. The rent-book produced by the defendant's witness corroborated the

obviate the statute as to all. I am, therefore, of opinion, that as to all the payments made in *J. Clark's* lifetime, the case was taken out of the statute by that conversation and the steward's book. Then, as to the payment made by the plaintiff, as administratrix, I think she is entitled to recover that also. *Ord v. Fennick* and *Webster v. Spencer* are merely instances where an executor *can sue*, and do not shew where he *cannot sue*. It has been assumed, that where the payment is a *devastavit*, the personal representative can only sue in his own name. That is a principle to which I cannot assent; on the contrary, when he discovers that he has in his representative character paid that which he ought not, he may in the same character recover it again. The money was assets; and if the suit be as executor or administrator, it will continue assets; but if the suit be in the individual capacity, the demand will be in the first instance, subject to a set-off, or when recovered will be liable to the plaintiff's debts. A *devastavit* is a wrong, and the law will not compel an executor to persevere in a wrong. Upon the whole, therefore, I am of opinion that the former payments were taken out of the statute, and that the plaintiff may recover the latter in her representative capacity.

HOLROYD J. I am of opinion that the verdict must be sustained for the whole amount. The effect of fraud upon the statute of limitations cannot be discussed on these pleadings. The replication insists that the cause of action arose within six years, and that is the only question. Now, although the right to recover arises out of the fraud, yet the right of action was complete as soon as the money was paid. But the case is taken out of

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of the statute by the conversation with *Wilds*, who spoke of others as well as himself. The whole must be taken with reference to the claim of all the tenants. The conversation of the defendant admits, that if any wrong was done, it had not then been rectified; nor did he make any distinction between *Wilds* and the other tenants. That would take the case out of the statute if there were legal evidence that a wrong or mistake had been committed. The question as to that was left to the jury, and I think properly disposed of by them. As to the last point, the objection made is invalid. My Brother *Bayley* has put it on a very clear ground. The money was assets, and therefore, if the payment were wrongful, was recoverable as assets. The administratrix might be liable for a *de-vastavit*, but that would not prevent her from suing as administratrix. Indeed she was bound so to sue, in order to protect the assets from a set-off for her individual debts. Both objections then fail, and the verdict must stand.

BEST J. The jury have decided the first question in this case, viz. that a fraud was practised. To the next

have been Lord *Mansfield's* opinion in *Bree v. Holbeck*. But the case was taken out of the statute by the defendant's acknowledgment, that the debt existed if the payments were wrongful. The case of *Mounstephen v. Brooke* decides, that an acknowledgment to a third person is sufficient. A promise was unnecessary ; the pleadings state a promise, but that is what the law implies when an acknowledgment of the debt is proved. Then the only question is, whether the plaintiff can recover the last payment as administratrix. *Ord v. Fenwick*, and *Webster v. Spenter*, shew that where the money is assets, the action may be brought in the representative character. No doubt this money will be assets, and the safest and best mode is to proceed for it in the right of the intestate.

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Rule discharged.

WHITLOCK *against* UNDERWOOD.

ASSUMPSIT on a promissory note, whereby defendant "promised to pay to plaintiff, or bearer, 40*l.*, value received." At the trial before *Park J.*, at the last Spring assizes for *Coventry*, the note was produced, and appeared to be on a half-crown stamp ; whereupon it was objected, that it should have had a five-shilling stamp by the 55 G. 3. c. 184. sched. part. 1. The learned Judge was of that opinion, and directed a nonsuit. A rule nisi having been obtained in *Easter* term to set aside the nonsuit,

A promissory note for 40*l.*, payable to bearer generally, and therefore, in law, payable on demand, is within the first class of promissory notes in schedule, part 1., to the 55 G. 3. c. 184., and requires a 5*s.* stamp.

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Clarke shewed cause. This note being made payable generally, without naming any specific time, was in law payable on demand; it therefore falls within the first class of promissory notes in the schedule to the 55 G. 3. c. 184, and being for more than 30*l.*, and less than 50*l.*, should have been drawn upon a five-shilling stamp. The nonsuit was therefore perfectly correct.

Reader and *Adams*, contra. At the foot of the first class of notes in the schedule to the 55 G. 3. c. 184, there is a memorandum, that all the notes therein enumerated may be re-issued. Unless, therefore, this is a re-issuable note, it is not liable to the stamp duty mentioned in that part of the schedule. There are several sections in the body of the act which shew what notes are re-issuable. The 14th section enacts, "that notes for any sum not exceeding 100*l.*, duly stamped according to the directions of the act, may be re-issued." The 24th section requires a licence to be taken out for issuing any notes "charged with a duty, and allowed to be re-issued as aforesaid;" and the 27th section imposes a penalty of 100*l.* upon any person issuing without a licence, any note "for money payable to bearer on de-

illustrates this: "Bills of exchange to the bearer, or to order, either on demand or otherwise, not exceeding two months after date, above 80*l*., and not exceeding 50*l*., are to have a stamp of 2*s*. 6*d*." That, therefore, would have been sufficient for a bill drawn in the same words as this note; and it cannot be supposed that the legislature intended to put those two descriptions of instruments on a different footing. If it be held that this note was re-issuable, then it follows that notes for less than 100*l*. cannot be made payable on demand without a licence; for the penalty in the 27th section is imposed upon the issuing, not the re-issuing, of such notes. The 24th section makes a licence necessary to issue notes payable on demand, "and which are re-issuable;" now these words would be quite unnecessary if all notes payable on demand were re-issuable.

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BAYLEY J. This is an extremely hard case; but, upon looking at the statute, I am satisfied that the note was not drawn upon the proper stamp. The schedule, part I., first provides for bills of exchange, and afterwards makes distinct provisions for various kinds of promissory notes. Bills of exchange are divided into two classes: "to the bearer or to order, either on demand or otherwise, not exceeding two months after date;" and "to the bearer or order, at any time exceeding two months after date." Had the instrument before us been a bill of exchange, the half-crown stamp would have been sufficient. Then, promissory notes are divided into four classes: first, "for the payment to the bearer on demand of any sum of money, not exceeding 100*l*.;" secondly, "for the payment in any other manner than to the bearer on demand, but not exceeding two months after

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after date or sixty days' sight, of any sum of money amounting to 40*l.*, and not exceeding 100*l.*;" thirdly, "for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days' sight, of any sum of money exceeding 100*l.*;" fourthly, "for the payment, either to the bearer or otherwise, at any time exceeding two months after date or sixty days' sight, of any sum of money amounting to 40*s.*" Now does the note in question fall within either, and which of those classes? Clearly, it is not within the second or third. If within the fourth, because drawn for an indefinite period, still it would be bad; for then it should have had a 3*s.* 6*d.* stamp. But I think it quite clear that it falls within the first division. It is payable to bearer, and in law payable on demand, and is drawn for a sum not exceeding 100*l.*; and it does not appear to me that that part of the schedule is confined to such notes as may lawfully be re-issued. The schedule taken alone imposes a certain duty upon all notes drawn in a particular form, and then confers upon all such notes the privilege of being re-issued. The clauses which require a licence for that purpose, and impose a penalty upon unlicensed persons for issuing such notes, do not in any way affect the question, as to the necessity of having any particular stamp. The nonsuit was therefore right, and this rule must be discharged.

(a) BEST J. The question is, whether this note falls within any of the classes given in the schedule to the 55 G. 3. c. 184. It is payable to bearer on demand for

(*) Holroyd J. was sitting at the Old Bailey.

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a less sum than 100*l*. It clearly comes within the first class. There certainly is a memorandum making the notes specified in that class re-issuable; and it has been contended, that the duties are meant to attach upon those notes alone which are issued by persons authorised to re-issue them. As to the argument that bills of exchange, payable on demand, do not require so large a stamp, it is to be observed, that the legislature might very reasonably make a distinction between them and promissory notes, for bills of exchange have never been circulated as currency. I am, therefore, clearly of opinion, that the note in question was not drawn upon the proper stamp, and that the nonsuit was right.

Rule discharged.

The KING *against* The Inhabitants of BARDWELL.

UPON an appeal against an order of two justices, for the removal of *Peter Firman* from the parish of *Bardwell*, in the county of *Suffolk*, to the parish of *Irworth*, in the same county, the order was quashed by the sessions, subject to the opinion of this court, upon the following case. About twenty-four years ago, the pauper, a married man, was hired for a year, by Mr. S., of *Irworth*, as his shepherd; he was to have a house and garden rent free, seven shillings a week, and the going of thirty sheep with his master's flock as wages.

The pauper was hired for a year as a shepherd: he was to have a house and garden rent-free, 7*s*. a week, and the going of thirty sheep with his master's flock, as wages. He served for two years at those wages in the parish of *I.*, during all which time the sheep went on his

master's farm, the whole of which was situated in that parish. The feed of the sheep was worth 16*l*. per annum: Held, that this did not confer a settlement, it not being any part of the bargain that the sheep should be pasture-fed.

Seemle, That in order to gain a settlement by renting a tenement, the pauper must reside upon some part of it.

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The pauper lived for two years with Mr. S., in the parish of *Ixworth*, at these wages, during all which time the thirty sheep went with his master's flock on the farm, the whole of which was situated in that parish. The feed of the thirty sheep was worth 16*l.* a year, exclusive of the house and garden. If the pauper had not been allowed to keep the sheep he must have had more wages.

Storks, in support of the order of sessions, was stopped by the court.

Dover, contra. The pauper gained a settlement in *Ixworth*, by the going of the thirty sheep with his master's flock. It has been frequently decided that the liberty to take the profits of land by the mouths of cattle is a tenement within the 13 & 14 *Charles 2. c. 12.*, and in the present case that right is found to have been worth 16*l.* per annum. *Res v. Melkridge (a)* shews that payment by service is equivalent to payment in money. The pauper therefore may be said to have rented a tenement of more than 10*l.* annual value, *Res v. Minster (b)*, [*Bayley J.* Is there any case, except *Res v. Minster*, where the pauper gained a settlement by renting a tene-

only question disoussed and decided was, the nature of the consideration given for that tenement. In *Rex v. Oswald Twistle*, decided in *Michaelmas* term, 1818, it was held, that unless it was stipulated in the original bargain, that the cows should be pasture-fed, a settlement would not be gained, and that decision was recognized and acted upon in *Rex v. Sutton St. Edmunds.* (a) In the present case it is probable that the sheep were fed upon growing produce, to the value of 10*l.* per annum; but as it was not any part of the original bargain that they should be so fed, it falls expressly within those two cases, and is not sufficient to confer a settlement. There is another point also which makes it extremely doubtful whether the pauper could have gained a settlement, had the going of the sheep constituted a tenement of 10*l.* annual value. The house and garden being merely for the more convenient performance of the pauper's service as shepherd, must be laid out of consideration; he did not occupy them as a tenant, but as a servant. The statute 13 & 14 *Car. 2. c. 12.* requires that the party should come to *settle* on the tenement: now that means to reside. In all the cases determined on this part of the act the pauper resided upon some part of that which constituted the tenement. There are cases where a party, from kindness, was allowed to reside in a house, rent free, that was held to be a tenement. But here the pauper had no residence but in the character of a servant; the house continued the master's, and the pauper was, with respect to this point, in the same situation as if he had lived in a room in his master's house. The two cases referred to differ from this, for in each of them the pauper had property

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(a) 1 *B. & C.* 536.

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of his own in the parish, and was on that ground held to be irremovable. *Rex v. Denbigh* (a), also, is distinguishable, for there the pauper lived in the toll-house, as his own residence; and it would have been such a tenement as would confer a settlement, but for an act of parliament which says, that no gatekeeper shall gain a settlement by renting the tolls and residing in the toll-house. (b) For these reasons I think that the pauper did not gain a settlement in *Lezworth*, and that the order of sessions must be confirmed.

BEST J. (c) In *Rex v. Minster* the principal point was given up, viz. whether the feeding of the cows constituted a tenement; but the court there thought that a house occupied by the pauper, merely as a servant, did not constitute a tenement. Here there was not any agreement that the sheep should be fed on growing produce; this case, therefore, falls within *Rex v. Orwald Twissle*, and *Rex v. Sutton St. Edmonds*. I agree, also, that the pauper, to gain a settlement, must reside upon some part of the tenement. I am not, indeed, aware of any express decision to that effect; but looking at the words of the statute it appears, that merely

In most of them, indeed, it does appear that he so resided, but that was not insisted upon as necessary. Thus in *Rex v. Butley*, *Burr. S. C.* 107., the pauper rented a house in which he resided; but *Page* and *Probyn* Js. seem to rely upon his residence being in the parish, and not upon its being on the tenement. So in *Rex v. Shenston*, *Burr. S. C.* 474., Lord Mansfield speaks of a residence in the parish as necessary. *Dennison* and *Wilkes* Js. advert to the fact of the pauper's residence being on the tenement; the latter of them observes, "It is settled that the residence upon a part of the different takings is sufficient to gain a man a settlement in the parish where he resides." In *Rex v. Llandverras*, *Burr. S. C.* 571., the pauper did in fact reside upon a part of the tenement; but *Aston* J. says, "The pauper need not reside upon any part of the tenement he takes; it is enough if he resides in the parish." It does not, however, appear that the rest of the court (*Lord Mansfield*, *C. J. Yates* and *Hewitt* Js.) expressed any such opinion. In *Rex v. Old Alresford*, 1 *T. R.* 358.; *Rex v. Stote*, 2 *T. R.* 451.; *Rex v. Poddletrentside*, 3 *T. R.* 772.; *Rex v. Draxton*, 4 *T. R.* 348.; *Rex v. Tolpuddle*, 4 *T. R.* 671.; the point does not appear to have been noticed: in the two former the pauper did reside upon a part of the thing taken; in the three latter it does not appear whether the fact was so or not. In *Rex v. Knighton*, 2 *T. R.* 48., the pauper did not reside in the parish where the tenement was situated; and *Ashurst* J., who delivered the judgment of the court, says, "There must be a residence either on the premises, or at least in the parish where some part of the premises lies." Throughout this series of cases it appears that the principal discussion was respecting the nature of the thing taken, and its value: the meaning of the expression "shall come to settle," in the 13 & 14 *Car. 2. c. 12.*, was lost sight of; and perhaps it was not strictly attended to in those cases where it was held that various takings in different parishes confer a settlement in that parish where the pauper resides, if the aggregate value be 10*l.* per annum.

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**The King against The Inhabitants of MACHYN-
LLETH and PENNEGOES.**

An indictment stated that an ancient bridge, situate within the parishes of *Machynlleth* and *Pennegoes*, was out of repair, and that the inhabitants of the said parish of *Pennegoes* and town of *Machynlleth* aforesaid, from time immemorial, by reason of the tenure of certain lands in the said parish of *Pennegoes* and town of *Machynlleth*, have repaired the bridges: Held, upon error, that the indictment was bad, because it did

THIS was a writ of error upon a judgment of the court of quarter sessions, for the county of *Montgomery*, upon an indictment for not repairing a bridge; which charged, that a certain ancient bridge over the river *Diflas*, commonly called *Pontfelingerrig* bridge, and situate within the parishes of *Machynlleth* and *Pennegoes*, in the said county of *Montgomery*, on the king's highway there, the same being from the time whereof the memory of man is not to the contrary, a common king's highway used for all the king's subjects, with their horses, coaches, carts, and carriages, to go, return, and pass at their will and pleasure, on, &c., and for the space of two years thence next following, was very ruinous, &c. for want of due reparation thereof, so that the subjects of the king, with their horses, &c. could not pass as they ought, and were wont to do. The indictment then stated, that the inhabitants of the said parish of *Pennegoes* and town of *Machynlleth* aforesaid, from time immemorial, by reason of the tenure of certain lands in the said parish of *Pennegoes* and town of *Machynlleth*, have repaired the bridges: Held, upon error, that the indictment was bad, because it did

the indictment was then stated, and that defendants were found guilty; and that it was adjudged that the said inhabitants in the indictment specified should pay a fine of 400*l*. The following errors were assigned: first, that the inhabitants of the parish of *Pennegoes*, and the inhabitants of the town of *Machynlleth*, were stated to be jointly liable to the repair of the bridge; and, secondly, that it was not stated in the indictment that any part of the bridge was within the town, or that the inhabitants of the parish of *Pennegoes*, and the inhabitants of the town of *Machynlleth*, were a body corporate. The case was now argued by

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Sir William Owen. The offence charged, is the non-repair of the whole bridge, which arises not from the joint neglect of the two bodies, but from the separate neglect of each. The offence, therefore, should be charged *separaliter*, or in separate indictments. 2 *Hale's P. C.* 174., *Hawkins P. C.* b. 2. c. 25. s. 89. *Rex v. Kingston* (a), *Rex v. St. Pancras*. (b) Secondly, the bridge is charged to be in the parish of *Pennegoes* and *Machynlleth*, but no part of it is stated to be in the town of *Machynlleth*, non constat that the town and the parish are co-extensive, or that the town is in the parish; and it is clear, that the inhabitants of a town would not be bound to repair a bridge situated out of the town, *Rex v. The Inhabitants of Gamlingay*. (c) And *Rex v. St. Giles, Cambridge* (d), is an authority to shew, that in order to charge a parish for the repair of a road situate out of the parish, a consideration must be shewn. The effect

(a) 8 *East*, 41.(b) *Penk's N. P. C.* 219.(c) 5 *T. R.* 513.(d) 5 *M. & S.* 260.

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of this indictment is to charge the inhabitants of a town to repair a bridge situate out of the town. Thirdly, the inhabitants of the county being liable to repair, the inhabitants of a township cannot be liable to repair by reason of the tenure of lands, because, as inhabitants, they cannot hold lands. *Ireland and Free Borough Case.* (a) *Viner's Abr. Corporation, (E.)* And they cannot be intended to be a corporation by the name of inhabitants. *College of Physicians v. Salmon* (b), and *Anonymous.* (c) [He was then stopped by the Court.]

Campbell, contra. It must be taken upon this record, that the bridge is within the town, or that the inhabitants of the parish and town are liable by tenure. The indictment charges a joint obligation of the parish and township to repair, and if so, a neglect to repair constitutes a joint offence. [*Bayley J.* Can you shew that the inhabitants of a town can in any case be bound to repair a bridge situate out of the town.] The indictment charges that the bridge is situate within the two parishes, and then that the inhabitants of the parish, and the inhabitants of the town of *Machynlleth aforesaid* have been used to repair. Now there is no other *Mac-*

bitants of the parish and of the township may be liable by reason of a joint tenure of the same lands.

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BAYLEY J. The objection to this indictment is fatal. The bridge is described as situate within the parishes of *Machynlleth* and *Pennegoes*. But the parishes are not alleged to be within the town. And unless the bridge be situate within the town, the inhabitants of the town would not be liable unless a special consideration be shewn. And here they cannot in their character of inhabitants be liable by reason of the tenure of lands. For they cannot as such hold lands.

HOLROYD J. It is quite clear that the judgment cannot be supported. The word *town* cannot be rejected, and if it could, it would not then appear upon the record that any person came to defend for the parish of *Machynlleth*.

BEST J. The case of the *King v. The Inhabitants of St. Giles, Cambridge*, is an authority to shew that the inhabitants of a township cannot be liable for the repair of a road situate out of the township, unless a consideration for such repair be shewn. Here that is attempted to be shewn, by alleging that the inhabitants of the parish and the town were liable by reason of the tenure of certain lands, but as inhabitants they could not hold lands, and it is not shewn that they are incorporated. The consideration, therefore, fails, and it not being shewn that the bridge was within the town, the common law liability does not attach, and therefore the judgment cannot be supported.

Judgment reversed.

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CARGEY *against* JAMES AITCHESON.

The declaration stated that the plaintiff and defendant, by articles of agreement, (reciting that several actions, arising out of the same transaction, had been brought, and defended by the plaintiff, defendant, *G.A.* and *D.A.*, and that in one of them the assignees of one *J. T.*, a bankrupt, recovered against the now plaintiff £500*l.*, and that disputes existed between the now plaintiff and defendant respecting the value of the goods and stock which each had

DEBT on an award. The declaration stated that certain differences having arisen, and being between the plaintiff and defendant, on, &c. at, &c. by articles of agreement made between the plaintiff of the one part, and the defendant of the other part; reciting, that an action was then lately depending in the Court of King's Bench, between *Cargey* as plaintiff, and one *Thomas Purvis*, defendant, which cause came on to be tried at the then last assizes for *Northumberland*, upon which a verdict was given for the defendant; and reciting also, that another action was depending in the said Court, wherein the assignees of *John Tarleton*, a bankrupt, were plaintiffs, and the said plaintiff was defendant; and which last mentioned action came on to be tried at the same assizes; and reciting also, that there were several actions depending between the said assignees and the said defendant in the present action, *George Aitcheson*, and *Darvil Aitcheson*, relating to the same transaction:

and reciting also, that it was agreed that a judgment in the action by the said assignees against the plaintiff, should be recorded for the plaintiffs with 4000*l.* damages; and that a rule of court was drawn up, that upon payment of 2500*l.* to the plaintiffs, and immediate possession of a certain farm at *Great Ryle*, in the county of *Northumberland*, delivered by the said *G. A.* and *D. A.*, the tenants thereof to their landlords, the said judgment should be satisfied; that all the actions pending for the same transactions should be no further proceeded in, and that each party should pay his own costs; and reciting also, that divers disputes and differences had arisen between the said plaintiff and the said defendant in this suit, about the value of the stock and goods which each of them received into their custody from the said farm, and their keep and feeding by the plaintiff in this action; and also concerning the sums, which, according to an agreement entered into between them before the said assizes, they respectively should contribute towards the payment of the 2500*l.*, and the costs incurred in bringing and defending the said actions brought and defended by the now plaintiff and defendant, *G. A.* and *D. A.*; and that, in order that the said differences might be amicably settled, the plaintiff and defendant in this suit had agreed to refer the same to *J. T.*, *J. R.*, and *T. C.*, as thereafter mentioned: it was witnessed, that, for ending all disputes and differences between the said parties thereto, the plaintiff did thereby covenant with the defendant, and the defendant did thereby covenant with the plaintiff, that they, the plaintiff and defendant, would truly perform the award of the said *J. T.*, *J. R.*, and *T. C.*, of and concerning the said matters in difference; the declaration then averred
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the making of an award by the arbitrators, which award, after reciting the articles of agreement, was as follows: We, the said *J. R.*, *J. T.*, and *T. C.*, having taken upon ourselves the burden of the arbitrations, and having heard and weighed the allegations of both the parties concerning the matters so in difference as aforesaid, and examined the various vouchers, documents, and evidence, relative thereto, do, by these presents, in writing under our respective hands, award that all disputes and differences now or heretofore subsisting between them, or between the said *Gilbert Cargey* and *James Aitcheson*, relative to the matters referred to us by the articles of agreement, shall henceforth cease and determine. And we further award that the said *James Aitcheson* do and shall pay unto the said *Gilbert Cargey* on, &c., the sum of 444*l.* And we do hereby further award that the said *Gilbert Cargey* shall pay or cause to be paid five-eighth parts, and the said *James Aitcheson* shall pay three-eighth parts of all costs incurred either in prosecuting the action brought by the said *G. Cargey* against *T. Purvis*, or of defending the several actions wherein the assignees of *J. Tarleton*, a bankrupt, were plaintiffs, and the said *Gilbert Cargey*

penses attending this arbitration and of these presents, shall be paid and satisfied by the said *Gilbert Cargey* and *James Aitcheson*, in equal shares and proportions; and lastly, we further award, that the said *Gilbert Cargey* and *James Aitcheson* shall, upon payment of the sum of 444*l.*, and the costs, charges, and expences of the said several suits, and the charges and expences of this arbitration, execute unto each other mutual and general releases and discharges of all actions, &c. relating to the premises so referred, or any of them, from the beginning of the world to the day of the date of the said hereinbefore in part recited articles of agreement. Breach, non-payment of the sum of 444*l.* Demurrer and joinder.

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F. Pollock, in support of the demurrer. The award is bad for two reasons; first, it is not in pursuance of the submission; and, secondly, it is not final. The direction, that the defendant should pay a specific sum, is not in pursuance of the authority given to the arbitrators, which was, that they should determine what was value of the stock and goods taken from the farm, and what each should contribute towards the sum of 2,500*l.* and costs. It was not competent for them to get rid of the calculation by awarding that one party should pay a certain sum, nor by giving proportions whereby a calculation should be made respecting the costs and expences. In *Matthews v. Price*, in C. B. (not yet reported) the submission was that an estimate of certain expences should be made, and a sum certain being awarded, that was held bad. Then the direction in the award, that the sums already expended should be taken, as part of the proportions to be paid is not final, but must

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must be matter of future reference, so that there could be no end of the discussion. Besides if either party had already advanced more than his proportion, no remedy is provided for him.

Wightman, contra. The plaintiff, *Cargey*, was originally liable to pay the entire sum of 2,500*l*. The award, therefore, by stating that the defendant shall pay 441*l*. does, in fact, fix the proportion which each shall pay, for *Cargey* must discharge the residue. This part of it, then, is certain, and according to the submission. The remainder of the submission was as to the costs and expences, and the arbitrators have awarded that they shall be borne in certain proportions. It was impossible for them to render that part of the award more certain, until the costs were taxed; and as the taxation will make that part of the award certain, the rule *id certum est quod certum reddi potest* applies. *Beale v. Beale* (a), *Hanson v. Liversedge*. (b) With respect to that part of the award which directs that the sums already expended shall be allowed in the calculation, that either relates to the costs, and is therefore sufficiently certain and final, or it is beyond the submission, and if so, it

Pollock, in reply. The cases cited are distinguishable from this, for where the submission does not point out the matters in dispute, they must be shewn by evidence; but here certain matters were pointed out by the submission, and if the arbitrators have not decided on the whole of them the award is bad. Personal expences were within the submission; if it be uncertain whether the arbitrators took them into consideration, the award is bad on that ground; if it be admitted that they were taken into consideration, the award is bad, not being final in that part of it.

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CARCY
against
AITCHESON.

BAYLEY J. I am of opinion that the plaintiff is entitled to recover. The action is on an award set out in the declaration, and the plaintiff will be entitled to recover on that part of the award, whereupon a breach is assigned, unless the court can see that it is bad. It is alleged to be contrary to the submission, and not final; but it is necessary for the defendant to make out the objection, and to make it out by something appearing on the face of the declaration. Whether any fresh facts might have been stated, which would have helped to support the objection, is not a question before the court, for we can only look to the pleadings. Now the matters submitted are, the value of the stock and goods which each of the parties received into his custody, and their keep and feeding by the plaintiff, the sum or sums which, according to an agreement entered into between them, they should respectively contribute towards the payment of the said sum of 2,500*l.*, and the costs incurred in bringing and defending certain actions. The plaintiff would be bound to pay the whole sum of 2,500*l.*, the judgment being against him, and must now discharge

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CASEY
against
ATKINSON.

charge all but the part awarded to him. The award imports, that the arbitrators have taken into consideration the matters in difference, and they first award, that all disputes shall cease, then that the defendant shall pay a certain sum. That imports, that the arbitrators taking into consideration the value of the goods, the stock, and their keep, and feeding, thought that the defendant ought to pay 444*l*. We cannot presume that they omitted any thing, and must therefore conclude that 444*l*. was the proportion which the defendant was to pay of the 2500*l*., taking all the other ingredients into the account. Then, is the other part of the award final? The submission is of the costs and expenses incurred in bringing and defending certain actions. Now the sum to be paid might be ascertained either by fixing it in the award, or referring it to an officer whose duty it is to say what shall be the whole sum paid for costs. Perhaps justice could only be done by fixing the proportion which each should contribute; for the award was to be made within a limited time, and the costs might not then be taxed. It has been observed that the agreement referred to should have been shewn; but the defendant might have pleaded

it does not appear that there was any controversy upon that point. The objection therefore fails ; and the award being good as to the 444 $\frac{1}{2}$., the plaintiff is entitled to judgment in his favour.

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CARGIE
against
MITCHESON.

HOLROYD J. The award cannot, upon these pleadings, be considered not final. That must either appear upon the face of the award, or by facts stated in a plea. It does not appear upon the face of the award. The decision of the arbitrators may have embraced all the matters in dispute mentioned in the submission. The sum of 444 $\frac{1}{2}$. may have been awarded to the plaintiff upon the disputes, as to the value of the goods and stock, their keep, and the 2500 $\frac{1}{2}$. ; and it appearing by the submission that the plaintiff was the person from whom that sum was recovered, he must of course pay the residue, the award is therefore final as to that, and according to the submission. If there were other facts not taken into consideration, that should have been shewn by a plea. The other objection resolves itself into the same question, whether the award be final or not. The dispute might be as to the proportion of the costs which should be borne by each party. The arbitrators have decided that ; but by law the costs are to be taxed by an officer of the court, and, therefore, although the arbitrators have not determined the amount, that is not a valid objection to the award. Had they awarded that the whole of the costs should be paid by one party, that would have been good without ascertaining the amount ; and the award is consequently good, awarding that they shall be borne by the two parties in certain proportions. If it had been alleged in a plea that the sums already expended were a matter in controversy, that might have

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CASES
against
ARROWSON.

vitiated the award. But upon a demurrer to the declaration, we must say that the objections are not established; if that could have been done by extrinsic evidence, it should have been pleaded.

BEST J. An award should always be supported, unless there be some unanswerable objection to it. It is said that this award is uncertain, and not final; uncertain as to the 444*l*, but that is not so. The question submitted was, what proportion of the 2500*l* should be borne by the defendant. After payment of the 444*l*, and the execution of the releases awarded, all discussion as to that must end; the award is therefore certain. But then it is urged, that if the award be not final in another part, it is altogether void; and it is argued that the award is not final as to the costs and the mode of paying them. As to the costs, the award directing that each shall bear a certain proportion, is final. As to the mode of paying them, viz. by allowing the monies already expended as part, I think that was not within the submission, and therefore cannot vitiate the award. The submission was, of the costs to be paid, not of the mode of paying them. The general rule, that the arbi-

1828.

CATHERINE GREIG *against* TALBOT.

DECLARATION upon a bond, whereby the defendant, one *W. Redman*, and *G. Moth*, became jointly and severally bound to the plaintiff in 1000*l*. The condition which was set out in the declaration was, that one *W. Redman* and one *G. Moth*, and each of them, should abide by the award of *J. C.*, *T. H.*, and *D. M.*, elected and chosen as well on the part of the said *W. Redman* and *G. Moth*, as of the said plaintiff, to be made on or before the 1st of *February*. Averment, that after the making of the writing obligatory, with the said condition, and before the 1st day of *February*, in the condition mentioned, to wit, on, &c., each of them, the said *W. Redman*, and *G. Moth*, and the said defendant, by a certain deed-poll, under his hand, and sealed with his seal, indorsed on the back of the said writing obligatory, and by each of them respectively delivered to the plaintiff, and the plaintiff, by her certain deed-poll, under her hand and seal, delivered to *W. Redman*, *G. Moth*, and the defendant, did give and grant unto the said *J. C.*, *T. H.*, and *D. M.*, the arbitrators in the condition of the said writing obligatory mentioned, further time for making their award of and concerning the several matters by the said condition of the said writing obligatory referred to them, until the 1st of *March* then next, so that they, or any two of them, made their award on that day. Averment, that the arbitrators accepted the reference, and before the 1st of *March* made their award, which was set out; and non-

Debt on a bond conditioned for the performance of an award, to be made within a limited time. The declaration, after setting out the condition, stated that before that time expired, the parties to the bond, by deed, agreed to give the arbitrators further time for making the award, and that an award was made within the extended time; and alleged non-performance: Held, upon demurrer, that the action was maintainable upon the bond.

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GALIE
against
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performance of the award by *Redman* and *Moth* was averred. To this declaration the defendant demurred, and assigned for cause, that the award was not made within the time limited by the condition of the bond. The case was now argued by

Bayly, for the plaintiff. It is necessary to make out two points, in order to sustain this declaration. First, that where a bond or other thing executory is made subject to a defeasance, that may afterwards be altered altogether, or in part. Secondly, that the indorsement upon the bond, in this case, operates as a new defeasance, superseding the former one so far as relates to the time of making the award, and in point of legal effect incorporating in itself all the terms of the original condition to which it has reference, and applying them to such enlarged time. As to the first point, it is laid down in *Co. Lit.* 237. a., "that rents, annuities, conditions, warranties, and such like, that be inheritances executory, may be defeated by defeasance made either at the time, or any time after. So the law is of statutes, recognizances, obligations, and other things executory." And 1 *Rolle's Abr.* 590. D. 45., and *Fin. Abr. Dec. (D)* 2., are authori-

to the bond to which it related, might be pleaded in bar. In the case of *Pardons* (a) this case is stated. "A. was bound in a statute of 20*l.* to B.; B. sued execution, and the land of A. was delivered to B. in execution, till he should have levied the 20*l.*, and afterwards B. made a defeasance to A. by indenture, that if A. paid him 8*l.* at a certain day, then the recognizance, viz. the statute for 20*l.*, should be void; and it was adjudged, that although the statute was executed, yet the defeasance of the statute was sufficient in law to defeat as well the statute as the execution upon it; for the statute is the foundation of the whole, and, therefore, if that is defeated, all that is built upon it shall be defeated also." In *Shepp. Touch.* 398., it is laid down, that "if one make a lease for life, by deed, and afterwards, by another deed, grant to his lessee, that he shall not be impeached for waste, this is a good discharge; and if the lessee afterwards grant by deed to the lessor, that if he shall bring an action of waste against the lessee, that he will not make use, nor take advantage, of the deed of discharge, this is a good defeasance of the discharge: so that hereby it seems that a defeasance may be of a defeasance, and one defeasance after another, and regularly the last shall stand:" and several other cases are there put in illustration of this principle. These authorities fully establish that deeds and defeasances may be altered by subsequent instruments of the like or as high a nature; and that where there are two defeasances to the same instrument, the latter shall stand. Here, then, the second defeasance must stand; but as that by reference to the former defeasance, in effect, incorporates in itself all the terms

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(a) 6 Co. 13.

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of it, the only variation made is as to the time within which the award was to be made. *Evans v. Thompson* (a) expressly shews that such is the legal effect of the second deed; and that being so, then the first defeasance, subject to a fresh limitation as to the time of making the award, stands as a new defeasance to the bond. It may be said that the plaintiff must seek her remedy by an action of covenant on the deed, the bond being no longer in force. But it never could have been intended to substitute the deed in lieu of the bond; for the defendant, who was a mere surety, could be liable upon the bond only to the extent of the penalty; whereas, if the second deed is to operate in lieu of the bond, as the only security for the performance of the award, and the defendant may be sued in covenant, he may then be liable to any extent. It must, therefore, have been the intention of the parties, that the bond should continue in force, subject to a new defeasance, for the performance of an award within the enlarged time. *Brown v. Goodman* (b) does not govern this case; there the submission was by deed. The consent to enlarge the time was by parol, and therefore not sufficient. And that is stated to have been

breach of the agreement. In such cases, the action for a breach of the new agreement must be founded upon the subsequent, and not upon the original instrument. Here it may be conceded, that an action might be maintained upon the deed-poll, for not performing the award made within the extended time, and yet no action is maintainable upon the bond. That was made subject to a condition which has never been broken; and therefore the bond has never become forfeited, and, consequently, the penalty has never become a debt. It is enough for the defendant to shew that this action on the bond cannot be maintained; he is not bound to contend that the plaintiff is without remedy. The case of *Brown v. Goodman* (a) is expressly in point. In that case Lord Kenyon took this distinction, that although the plaintiff might have some remedy, he had not any remedy upon the bond by which the defendant bound himself, under a penalty, to abide by an award, if made within a given time. That penalty could never extend to an award made after that time under a new agreement. If, to a declaration on the bond, the defendant, after setting out the condition on oyer, had pleaded no award made, and the plaintiff had replied the deed-poll, that would have been a departure. *Evans v. Thompson* does not govern this case, for that was decided upon a motion for an attachment. No question arose as to the manner in which the party must have shaped his action, if he had sought his remedy by that mode of proceeding.

BAYLEY J. I am now satisfied, by the argument, and by the authorities cited, that the plaintiff is entitled to recover upon the declaration as it stands. This is an

(a) 3 T. R. 592. n.

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action upon a bond, the condition of which was, originally, for the performance of an award to be made, on or before the 1st of *February*: no award was made within that time; but before the 1st of *February*, and while the bond still remained in force, an agreement under seal was executed by each of the parties named in the bond, by which they gave to the arbitrators further time, until the 1st *March*, to make their award; and the question is, what is the legal effect of the second deed? Is it merely to give a remedy upon that deed, or is it, in substance, to vary the day mentioned in the condition of the bond, and to introduce, as a term into that condition, the extended period of time for making the award? The words import, that all the parties are to be placed in the same situation as if that extended period had been inserted in the original condition. The authorities cited in the argument establish most clearly, that deeds or defeasances may be altered by subsequent instruments of the like or as high a nature; and the question is, in this case, whether the parties have, by the second deed, merely varied the terms of the condition of the defeasance, or whether they have substituted the second deed in lieu of the bond, as a new and independent agreement of reference. It has been argued, that it was the intention of the parties, when they executed the second deed, to substitute it instead of the bond, as the only security for the performance of the award. I cannot think that that was the intention. The deed, in express terms, refers to the condition of the bond, and further time is given to the arbitrators named in that condition to make their award concerning the matters referred by the condition of the bond. The parties, then, must have considered the condition of the bond as containing the only agreement to refer; and they

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they must, therefore, have intended only to introduce a new term into that agreement by the subsequent deed. The deed was executed by all the parties to the bond. Now it appears that one of the arbitrators was named on the part of the plaintiff, and the other on the part of *Redman* and *Moth*. The defendant, therefore, must have been a surety, and if so, could have been affected by the bond only; he could not have been called upon to execute the second deed, for any other reason than that he should continue liable upon the bond. I am, therefore, perfectly satisfied, that it was the intention of the parties to vary the defeasance only, and to keep the bond in force as a subsisting security; and there being no authority to shew that such a deed may not apply to a defeasance only, without affecting the bond, I am of opinion that the legal effect of the second deed was to continue the bond in force, subject to a defeasance for the performance of an award within the extended time, and, consequently, that this action is maintainable. This case is distinguishable from *Brown v. Goodman*, because there the submission was by deed, and it did not appear that the consent to enlarge the term was by deed; and if not, it could not continue the effect of the preceding deed, and, consequently, would not suffice to give a remedy upon the bond, although it might leave the party a remedy for the breach of the Parol contract. *Evans v. Thompson* is a strong case, and an authority expressly in point. There the submission was by bond, the condition of which was for the performance of an award to be made within a given time; and before that time expired, the parties by an agreement indorsed upon the bond consented to enlarge the time. There was a term in the condition of the bond, that the submission should be made a rule of

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of court; but when the time for making the award was agreed to be enlarged by the indorsement, it was not added that that should be made a rule of court. The award was made within the enlarged time, but not within the time mentioned in the condition of the bond. A rule reciting the bonds of submission, and the agreement that they should be made a rule of court, and the agreement to enlarge the time, directed that the *same* should be made a rule of court. An attachment having issued for the non-performance of the award, a rule nisi was obtained for amending the rule of court, by confining it to the submission made by the bond and condition, and excluding the indorsement. After argument and consultation with the Judges of the other courts, it was held that the agreement to enlarge the time was to be considered as virtually incorporating in it by reference all the antecedent agreements, between the parties, relative to that subject, as if the same had been formally set forth and repeated therein; and among the rest, the agreement that the submission should be made a rule of court, and that with reference to the enlarged time, instead of the time originally specified in the condition of the bond. Upon the authority of that

poll incorporates in it all the terms of the original condition, and gives a remedy upon the bond. For these reasons I am of opinion, that the plaintiff is entitled to the judgment of the Court.

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HOLROYD J. Upon the facts alleged in this declaration, I am of opinion that this action is maintainable upon the bond. I think that the deed indorsed on the bond operated not merely as a covenant to abide by an award, but as a variation of the condition of the bond; and that it must, from its import, be taken to have been so intended. *Co. Litt.* 237. shews that an obligation may be defeated by a defeasance made either at the time when the obligation is executed, or at any time after; and the passage cited from *Sheppard's Touchstone* is confirmatory of that doctrine, and goes further, to shew that where several defeasances are made at different times, the last shall stand. The distinction is between things vested and a thing executory, as in a feoffment of lands. There, the estate is vested in the feoffee, and therefore a subsequent condition is void; but a bond is only executory, and may be defeated at any time by a deed, although not executed at the same time with the bond; and if there be two defeasances, the last is considered as a substitution for the first. And in *Comyn's Digest*, tit. *Defeasance*, (B 2.) it is laid down, that an obligation may be defeated by a defeasance, even after condition broken, as well as before. Now, in this case, the original defeasance was for the performance of an award to be made within a limited time; and the parties afterwards, but before the expiration of that time, by a subsequent defeasance under seal indorsed upon the bond, agreed to extend the time for making the award. If the latter instrument was intended to operate

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operate not as an entirely new agreement, but only as a variation of the agreement contained in the condition, then the bond would become subject to a defeasance applicable to an award made within the extended time. For, as a defeasance may be made at a subsequent time, or one defeasance may be substituted for another in toto, it follows that where the term of a defeasance is altered in some particular respect by a subsequent instrument of as high a nature, the part so altered may be considered as a substitution for the corresponding part in the original defeasance. In this case, therefore, the extended time for making the award may be considered as a substitution for the time mentioned in the condition. If the parties, by the deed indorsed on the bond, had stated that the bond was to be void upon the performance of an award by the same arbitrators within the extended time, without referring to the former defeasance, according to the authorities the latter defeasance would have stood. It appears to me to have been the intention of the parties to substitute the one for the other, as clearly as if they had incorporated in the latter deed all the words of the condition. The case of *Green v. Goodman* is distinguishable from the present



give a defence to the action, under certain circumstances. The new defeasance would give to the defendant a new defence, but does not alter the nature of the plaintiff's remedy, which would still be on the bond. The authorities referred to not only establish, that a defeasance may be made or altered, after the original deed is executed, so as to constitute a new agreement between the parties, but that the obligation continues the same, and may be sued upon, although the right to sue is controlled by the new defeasance. *Moore*, 573., is an authority to shew that there may be a new defeasance, provided it be in writing; but the court there did not think the nature of the plaintiff's remedy altered. So in 1 *Roll's Abr.* 590., it is said, that if there be two defeasances, the first is void, and the second only in force. If that be so, the second defeasance is a mere substitution for the first; but *Hodges v. Smith* is an authority expressly upon the very point. There the action was upon a bond for 200*l.*, and the defendant pleaded that after the obligation made, the plaintiff, by indenture, covenanted that if he paid 100*l.* at such a day, the obligation should be void, and then alleged that he paid on the day; the plaintiff demurred, on the ground that the indenture was made *after* the bond, and that the defendant, therefore, could only take advantage of it by way of covenant, and that it should not enure as a defeasance or a release: but all the court held that it was well pleaded in bar. *Evans v. Thompson*, also, is an authority to shew that all the terms of the original condition may be considered as virtually included in the deed indorsed upon the bond; and that therefore the latter may be considered as a new defeasance, the condition of which was to perform an award made within the extended time.

Judgment for the plaintiff.

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1822.

The King against The Inhabitants of the Extra-parochial Hamlet of Kingsmoor.

An indictment stated that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: Held, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair; nor that the hamlet did not form part of a larger district, the in-

THIS was an indictment preferred against the defendants at the quarter sessions for the county of Cumberland, for not repairing a road. The indictment charged the way in question to be an ancient king's highway, used for all the king's subjects; and that a certain part, situate in the *extra-parochial hamlet* of *Kingsmoor*, in the said county, therein described, was out of repair; and that the inhabitants of the extra-parochial hamlet of *Kingsmoor* the said common highway ought to repair and amend. The defendants were found guilty at the quarter sessions, and a writ of error was afterwards brought upon the judgment; and the error assigned was, that it did not appear by the indictment in what right, or for what cause, the inhabitants of the extra-parochial hamlet of *Kingsmoor* were bound to repair. The Court now called upon

field (a), and *Rex v. Penderryn (b)* But the common law obligation must have existed before the ecclesiastical division of the kingdom into parishes took place. The civil divisions of the kingdom into counties, hundreds, and tithings, is more ancient, having taken place A. D. 890, and, according to some authorities, at a much earlier period (c); whereas the ecclesiastical division was not completely effected till long after that time. 1 *Bl. Comm.* 112. Before the ecclesiastical division took place, the inhabitants of some known district must have been liable to the repair of the roads; and if any such district were not then included in the division of the kingdom into parishes, the liability to repair the roads, situate within it, remains as it was before. Now the road indicted is situate in a hamlet, or vill, not forming part of any parish, and therefore the inhabitants of such hamlet must be liable to repair of common right. The inhabitants of a vill were formerly liable at common law to the repair of roads. 27 *Liber Assisarum*, 44. (21). In *Compton's Jurisdiction*, 76. *Lib. Ass.* 63. is erroneously cited for this position. In 15 *Car. 2.* the inhabitants of the hundred of *Yarton* were indicted for not repairing a road; *Rex v. Yarton (d)*; and there *Twisden J.* stated that he had been counsel on a similar indictment for the vill of *Camberwell*. A parish is a mere precinct, within a diocese, and may comprehend several vills, or be part of a vill. *Com. Dig.* tit. *Parish*, (B 1.) A parish was not even recognized by common law; and when a place was mentioned generally, it was intended only to be a vill. *Wilson v. Larus (e)*, *Addison v.*

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ants of
Kresmoon.

(a) 2 *T. R.* 106.(b) 2 *T. R.* 513.(c) *Notes to Thomas's Edit. of Co. Litt.* 49. *Burn's Ecc. Law*, 1. 65.(d) 1 *Sid.* 140.(e) 2 *Salk.* 501.

Sir

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Sir John Otway. (a) [*Bayley J.* Assuming a vill to be liable, still the hamlet indicted may, for any thing that appears upon this record, be one of two or more hamlets forming one entire vill; and although the larger district should be liable, yet the hamlet, if a division only of the vill, would resemble a township, a division of a parish, and the manner in which the liability was incurred, must be shewn in an indictment against a township.] A township is a known portion or division of a larger district, which is recognized as liable by the common law to repair the highways within its limits; and therefore it is necessary that an indictment against the smaller division should shew in what way it has taken upon itself a burden to the relief of the larger district, which was originally liable, and of which it forms a part. Besides, a hamlet and vill are synonymous. *Rex v. Morris (b)*, *Rex v. Walbeck. (c)* A hamlet is, therefore, a division of the kingdom recognized by the law. A special custom may be alleged within it (*d*); and it is mentioned as a known district in the statute 27 H. 8. c. 25. The inhabitants of such division, if extra-parochial, must be liable to repair as of common right, both upon principle and authority; and if so, it cannot be necessary to allege immemorial usage

of the indictment that the road is situate in a hamlet which is not included in any parish. Therefore, *prima facie*, no persons are liable but those who were made defendants in this indictment.

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Courtenay, *contra*, was stopped by the Court.

BAYLEY J. It is the duty of a party preferring an indictment to shew, on the face of it, an obligation in the party indicted to discharge the duty for the neglect of which the indictment is preferred. It must be shewn that the party indicted is either liable of common right, or from some other special cause. The inhabitants of a parish are liable as of common right, and therefore, as against them, it is sufficient to allege that they ought to repair. But if it be sought to charge the inhabitants of part of a parish with the burden of repair, that being against common right, it must be shewn on the face of the indictment how they are liable, whether by custom or prescription. *Rex v. Penderryn*. It is said, however, that the inhabitants of an extra-parochial hamlet are, in this respect, in the same situation as the inhabitants of a parish, and are liable as of common right. I think we are not warranted, upon this indictment, in coming to that conclusion, nor are we called upon to decide whether the inhabitants of every known district were or were not bound by common law to repair the roads within it. In order to raise that question, it ought to have been shewn on the face of the indictment, that the hamlet of *Kingsmoor* neither forms part of, nor is connected with, any other larger district, the inhabitants of which are liable to repair the road in question. That not being

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stated, the general question is not raised. I am therefore of opinion that this indictment is bad, inasmuch as it does not shew that the hamlet of *Kingsmoor* is not part of any larger district, upon the inhabitants of which the obligation to repair may attach, or that the defendants are liable by immemorial custom or prescription. The judgment must therefore be reversed.

HOLROYD J. I think this indictment is bad. Upon a plea of not guilty to an indictment not charging a special obligation to repair, the general obligation need not be proved. The plea puts in issue only the facts alleged, and not the legal liability. In a common indictment against a parish for not repairing a road, upon a plea of not guilty, it is not necessary for the prosecutors to prove that the parish is liable, because the common law throws that burden upon the parish. In order to put in issue the liability of the parish, the defendants by their plea must shew a special obligation in some other body to repair. Here the only allegation of fact is, that an ancient highway, situate within the hamlet, was out of repair. The obligation to repair is stated as a conclusion of law, re-

the facts alleged in this indictment may be true, and yet the hamlet indicted may be part of a larger district, in which there is a present obligation to repair.

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BEST J. It is not necessary to consider whether the civil division of the kingdom is more ancient than the ecclesiastical, inasmuch as it is clear that the latter took place before the time of legal memory, and it is indisputable that the common law has thrown the burthen of repairing roads on parishes. If you proceed against any other district you must not only allege, that the inhabitants of such district are bound to repair, but you must shew from what the obligation to repair arises, viz. that they were bound by custom or prescription. (a) The cases in which this has been decided have been, where it has been attempted to throw the whole burthen of repairing roads on particular divisions of a parish, such as townships, instead of the entire parish. Those cases may be said not to apply to that which is now under consideration, because here there is no parish on which the charge can be thrown, the hamlet in which the road is situated being stated to be extra-parochial; but they are authorities which answer the argument, that the common law imposes the burthen of repairing on districts included within the common law division, and not such as belong to the ecclesiastical division. I can find no authority for saying that any thing but a parish is to be charged. If the law authorizes no charge except on parishes, places that are extra-parochial are not, by the general rule of law, liable. But there will be no diffi-

(a) *Rex v. Morton, Andrews*, 276. *Rex v. Great Broughton*, 5 Burr. 8700.

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culty in compelling the repair of old roads in such places. These roads must have been repaired by somebody; and proof of such repairs under an indictment, properly charging them, will oblige the persons who have repaired them to continue to do so. A case in *Siderfin* has been referred to, which is so loosely reported that it is difficult to understand it; I, however, collect from that case that an indictment against the hundred for not repairing a road, was bad; but as the hundred had pleaded to it the court would not quash it. This case cannot be considered as an authority in favour of the indictment before us, but rather against it. (a)

Judgment reversed.

(a) The same case is reported in *Keele*, 274. 498. 514., under the name of *Rex v. Inhabitants of Yarnston*; the report of it there is but little more intelligible than that given in 1 Sid. But it is not stated there that the defendants were the inhabitants of a hundred; on the contrary, in p. 498., it appears that the issue was, "that the defendants ought not to repair," which was argued to be contrary to law, "the lands being laid to be in their own parish:" and in 514. it is said, that the proceeding was an issue tried by consent.

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TRESPASS for breaking and entering three closes of the plaintiff, and digging pits and raising coal.

Pleas, first, as to all the trespasses, that the said several closes from time whereof, &c., had been parcel of the manor of *Farnley*, and that Sir *Thomas Danby* was seised of the said manor and the demesne lands thereof, with the appurtenances, and all coal mines, &c. lying under the said manor, in fee; and that he, on the 16th *January*, 1649, enfeoffed the then Earl of *Sussex* of, among other premises, the said three several closes in the declaration mentioned, (except and always reserved unto the said Sir *Thomas*, his heirs, and assigns, all tithes of corn and grain arising, happening, coming, or accruing within the said several messuages and farms aforesaid, and within every and any part or parcel thereof, and also except and always reserved out of the said feoffment unto the said Sir *Thomas* and his heirs all the coals in all or any of the said lands, woods, grounds, and

A. being seised in fee of the manor of *F.* and the demesne lands thereof, and of all the coal-mines lying under the manor, enfeoffed *C. D.* of and in certain closes, except and always reserved to the feoffor, his heirs, and assigns, all tithes of corn and grain, and also except and always reserved out of the said feoffment unto the feoffor and his heirs, all the coals in all or any of the said lands and premises, together with free liberty for them, the said feoffor and his heirs, and his and their as-

signs and servants, at all times thereafter, during the time that he, (the feoffor) and his heirs should continue owners and proprietors of the demesne lands of *F.*, to sink and dig pits, or otherwise to sough and get coals in all and every the lands and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their free will and pleasure; he, the said feoffor, and his heirs, paying to the feoffee, his heirs, and assigns, such satisfaction for the damages as two neighbours, indifferently chosen by the feoffee and feoffor, their heirs, and assigns, should from time to time award.

The heirs of the feoffor having for a valuable consideration conveyed to a purchaser in fee the manor of *F.* and its demesne lands, with its appurtenances, and all the coal-mines under (amongst others) the lands in question, &c., it was held that the coals were, by the exception, reserved to the feoffor in fee, and therefore that they passed to the purchaser; and, also, that the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits, and get the coals, so long as he remained owner of the demesne lands.

Semble, That the express liberty is not restrictive of that which would be implied by law to get the coals, and that the purchaser would be entitled to an incidental right to get them coextensive with his estate.

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premises, *together with* free liberty for them, the said Sir *Thomas* and his heirs, and his and their assigns and servants, from time to time, and at all times thereafter *during the time that the said Sir Thomas and his heirs should continue owners and proprietors of the demesne lands of Farnley*, to sink and dig pits, or otherwise to sough and get coals in all and every the said lands, woods, grounds, and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their wills and pleasures; he the said Sir *T. Danby* and his heirs, from time to time, giving and paying unto the said Earl, his heirs, and assigns, such sufficient satisfaction for all such damages as he the said Earl and his heirs should from time to time sustain by reason of the digging, sinking of pits, soughing, getting, and carrying away the said coals, in all or any of the said lands, woods, grounds, and premises, as two gentlemen, neighbours thereunto, being indifferently chosen by the said Earl and the said Sir *Thomas*, their heirs, and assigns, should from time to time order, award, and think fit to be given and paid); to hold the said premises unto the Earl, his heirs, and assigns, for ever. *Recited of which said settlement*

lands, with the appurtenances, after several mesne descents, (which were particularly set forth,) vested in one *W. Danby*, who, by lease and release, *A. D.* 1800, in consideration of a certain sum of money, conveyed the manor and lordship of *Farnley* and its demesne lands, with its rights, members, and appurtenances, and all the coal-mines in or under, amongst other lands, the said three several closes in which, &c., to *James Armitage* in fee; who thereby became seised in fee of the manor, and owner and proprietor of the demesne lands, and entitled to the coals so excepted as aforesaid, together with the liberty thereinbefore mentioned. The plea then stated that *James Armitage* died intestate, and that the defendant, as his eldest son and heir at law, became seised in fee of the manor, and owner and proprietor of the demesne lands, and entitled to the coals, &c., together with free liberty for him and his servants to sink and dig pits, or otherwise to sough and get coals and culm in the said closes in which, &c., and to sell and carry away the same at his free-will and pleasure, paying unto the plaintiff such sufficient satisfaction for damage, &c., as two gentlemen, neighbours, indifferently chosen, should award. The plea then justified the breaking and entering the said several closes in which, &c., for the purpose of sinking and digging pits, &c.; and averred that the defendant was willing to make such satisfaction for the damage sustained by reason of the supposed trespasses, as two gentlemen, &c., indifferently chosen, should award. The second plea only justified the breaking and entering the closes, because the plaintiff had wrongfully dug and got large quantities of coal lying under the said several closes in which, &c., and had deposited the same upon the said closes, wherefore defendant entered to take them away. To these

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pleas there was a general demurrer and joinder. The case was argued at the sittings after last *Easter* term.

Tindal, for the plaintiff. There are two questions raised upon these pleadings; first, whether the defendant has the right to enter and dig pits to get and take the coals. And, secondly, whether the defendant has the right to the coals themselves if he can get them without digging pits. As to the first point, the defendant has no right, under the express liberty reserved by the deed, to enter and dig pits, because it appears by the plea, that the heirs of Sir *Thomas Danby* have ceased to be owners and proprietors of the demesne lands of *Farnley*, and the liberty of entering to dig pits is limited expressly to the time during which the feoffor and his heirs should continue owners of the demesne lands. The right to enter, therefore, became extinguished when the heir of Sir *Thomas Danby* ceased to be owner of the demesne lands. In order to make it continue longer, it must be contended that the reservation has the same meaning as if the word *assigns* were inserted in it, but the word *heirs* does not necessarily include assigns. It is true, that if there be a gift of land to a man and his heirs, this enables him to give it to his assigns; that, however, is not because assigns are included in the word *heirs*, but because the donee takes a fee-simple, and the power of alienation is incident to that estate. Before the statute *quia emptores*, the word *assigns* was necessary to enable the party to alien although he had the fee. (a) It is clear, that the parties did not intend in this part of the exception to include *assigns* under the word *heirs*; for in the first part of the exception all tithes of corn are reserved

(a) *Horne's Mirror*, p. 11.

to the feoffor, his heirs, and *assigns*, but the reservation of the coals is to the feoffor and his heirs only. It is true, that if there were a general exception of the coal to the feoffor and his heirs, the law would imply a right to get it co-extensive with the reservation; but here, an express liberty is given to get the coal only so long as the feoffor's heirs continue owners of the demesne lands, and then the maxim applies, *expressum facit cessare tacitum*. The parties, therefore, have expressly limited the duration of the privilege, and it ought not to be enlarged by implication, unless the limitation be contrary to law. When the purchase was made, the parties may have contemplated the ceasing of the disturbance occasioned by getting the coal; and the deed shews that they did so, for although the coal itself is reserved in fee, the privilege of getting it is reserved for a limited time. And such a reservation is not against law, for it is not necessarily a restriction of a previous grant, as the coal may be got without making pits in the land. And even if the coal could not be dug at all, there would not be any thing illegal in such a bargain. [*Bayley J.* Your argument must go the length of saying, that the deed gave a freehold in the coals in futuro.] That objection would certainly apply, if part of the thing granted had been reserved; for then, as it would not pass by the livery, it would not pass at all, and the grant, as to that, would be void. But that rule is limited to things in existence at the time of the grant. Here, the privilege of entering to get coals was no part of the thing granted. It was not then in existence. A new incorporeal hereditament was then created, viz. a right to enter upon the land and to get the coals. The deed, therefore, operates as a re-grant of the exclusive right of digging coals, vesting in the grantor in fee, and determinable

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terminable on his ceasing to be owner of the demesne lands. [*Holroyd J.* You consider the right of entry as a grant, but if the coal by itself had been excepted without more, that would have given a right of entry for ever. You must therefore contend, that the subsequent exception of the liberty operates to extinguish what had been before given by law.] Here, the parties have expressly substituted a limited right of entry for that which the law would otherwise have granted, and *modus et conventio vincunt legem*. This does not operate as a grant of a freehold in the coals in futuro to the *feoffee* and his heirs, but as a grant of a new privilege to the *feoffor* and his heirs for a limited time; and then, like a rent-charge granted to *A.* and the heirs of his body, when *A.* ceases to have heirs of his body, it falls into the estate. As to the second point, the exception of the coal is as much limited as the liberty to get it, and it operates not as a reservation of a fee-simple absolute in the coal, but as a reservation of it so long only as the grantor and his heirs should remain owners of the demesne lands of *Farnley*; or in other words, as a reservation of a fee-simple in the coal, qualified as to the time of its duration. A grant to a man and his heirs

true that the limitation in this case taken, according to the strictest rules of grammar, applies only to the liberty of sinking pits; but taking the whole clause together, it appears clearly to have been the intention of the parties to make the two rights co-extensive. Why should the feoffor reserve the coals for a longer period than the right to get them. It cannot be supposed that he intended to reserve a right to the coals in fee, and a right to get them so long only as the ownership of the demesne lands was in him and his heirs. The whole ought to be construed as one reservation to him and his heirs, to have and get the coals during the time they should remain owners of the demesne lands; and if so, the feoffor only reserved a qualified fee in the coals determinable upon his heirs ceasing to be owners of the demesne land; and that event having happened, the estate of the feoffor is determined, and the defendant has no right to the coals.

Littledale, contra. The clause in question operates as a reservation of the right of working and digging the coals to Sir Thomas Danby, in fee. It must be construed as if it was a grant; and then it is quite clear, that it would not be necessary to have the word "assigns," in order to give an absolute fee. The first part of the clause operates as a reservation in fee of a right to the coals, and the restrictive part (which is no part of the grant) reserving the liberty to get them so long as Sir Thomas Danby and his heirs should remain owners, is void. In *Corbet's case* (a), the 11 Assize, p. 8. is cited, to shew, that if land be given to one and his heirs, so long as J. S. or his heirs should enjoy the manor of D.,

(a) 2 Anderson, 138.

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these words, "so long as," are vain and idle, and do not abridge the estate. In *Hornby's* case (a), the lessor having leased to *Clifton* for twenty-one years, certain premises, except and reserving to the lessor for his own sole use and occupation two chambers, &c., parcel of the messuage, it was held that the exception was absolute, and the words "for his own use and occupation" were vain and void words. It is true, that a different decision of that case is reported in *Dyer*, 264.; but the report of the same case in *New Bendloe*, 181., agrees with that in *Anderson*; and the ground of the decision is stated to be, that the latter words were void, because the things excepted were not demised. The report of the case by *Anderson* was considered correct in the case of *Cudlip v. Rundall*. (b) In the latter case the lease was of certain premises, excepting a certain house called the *New-house*, lately built, for the father of the lessor and himself, and their wives and families, *but not to be let to any other person whatever*; and when they did not dwell there, to be used by *Rundall*; and *Holt C. J.* considered this as an absolute exception, not qualified by the subsequent words. These authorities shew that the exception operates as a reservation of a fee

the law will imply, does not control the implied liberty. *Stukeley v. Butler* (a) is a strong authority in point. Besides, the effect of an exception is, to take that which is excepted out of the conveyance; and that being so, the right of getting the coals remains, as it was before the feoffment, in Sir *Thomas Danby*, in fee. Assuming, however, that the express liberty has the effect of controlling that which would otherwise exist, the defendant is within the meaning of the express liberty, for he is the owner of the coals, and also owner of the demesne lands; and construing the deed liberally, the liberty may be considered as reserved to any person being owner of the demesne lands, and of the coal, whether by descent or purchase. It must be wholly immaterial whether the party so exercising the liberty claims by descent or purchase.

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Tindal, in reply. The authorities referred to in *Corbet's* case are not to be found; and the only conclusion to be drawn from that case is, that a condition against alienation after a fee given is void, and that is not disputed. Here, the right to the coal and of digging pits for the purpose of getting the coal, was reserved, so long only as the heirs of Sir *T. D.* remain owners of the demesne lands. It has determined by the event which has happened, and the defendant, therefore, was a trespasser.

Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court; and, after stating the pleadings, proceeded as follows.

(a) *Hobart*, 168.

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The first plea raises two questions; one, whether Mr. *Armitage* is entitled to the coals under the closes in question, he not claiming by descent under Sir *Thomas Danby*, but by purchase; and the other, whether, for the purposes of getting them, he is entitled to use the means stated in the first plea. The second plea raises the former of these two questions only. Both questions depend upon the effect of the exception set out in the plea; and the plaintiff contends, that that exception gave nothing beyond a limited right to continue, so long only as Sir *Thomas Danby* and his heirs should continue owners of the *Farnley* demesnes; and the defendant, that it either gave an absolute and perpetual right in fee-simple to the coals, or at least that it gave the special liberty, so long as the owner of the coals should also be owner of the *Farnley* demesnes. The counsel for the plaintiff, if I understood him right, disclaimed all formal exceptions to the pleas, and stated the object to be, to ascertain whether Mr. *Armitage* had a right to the coals, and if he had, whether he had also a right to get them; and to these questions, without considering whether there are any formal objections to the pleas, my observations will be directed. The exception in question

to be found in *Sheppard's Touchstone*, 100. "The exception is always taken most in favour of the feoffee and lessee, &c., and against the feoffor, lessor, &c. And yet it is a rule, that what will pass by words in a grant, will be excepted by the same or the like words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman to view them, if he desire to sell them, and he or the vendee may cut them and take them away." And the same rule applies to grants. *Plowd.* 15, 16. *Vin. Abr. Tres.* (M a) *Hodgson v. Field.* (a) *Gerrard v. Cooke.* (b) The language of this feoffment is, "except and always reserved" out of the said feoffment unto Sir *Thomas Danby* and his heirs all the coals. The coals were part of the thing granted, part of the land, and in esse at the time. The consequence, therefore, according to *Co. Litt.* is, that if this, which in words was an exception, operated in point of law as an exception, the coals *semper cum Sir T. D. fuerunt*. They were never out of him, and without the words of inheritance, "and his heirs," would have remained as before in Sir *Thomas Danby* and his heirs. (c) And according to the rule I have last mentioned, from *Sheppard's Touchstone*, a right, as incident, to get the coals, and to do all things necessary for the obtaining of them, would have been excepted also. It was, indeed, conceded in the argument, that if the exception had stopped after excepting and reserving the coals to Sir *Thomas* and his heirs, and

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(a) 7 *East*, 613. (b) 2 *New Rep.* 109. (c) *Shepp. Touch.* 100.

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had contained no words to give him an express liberty for sinking pits and doing other works to get them, the exception would have enured, without any restriction, to Sir *Thomas* in fee; and that he, his heirs, and assigns, would have had a right *for ever*, to do what should be necessary to get the coals; but it is upon the ground, that the express liberty is limited, and restrictive of the former exception, that the plaintiff makes his claim. The question therefore is, whether the express liberty restrains the former exception, and if it do, to what extent it restrains it. One objection which occurs is this, the pleas purport to set out the feoffment according to its legal operation; that operation is stated to be, that Sir *Thomas D.* excepted the coals to him and his heirs. Is it open to the plaintiff upon his demurrer, to contend that this was not the operation of the exception? Is there any instance in which a party has been allowed, upon demurrer, without setting out the instrument at large, or traversing the operation ascribed to it, to raise the question, whether the deed has the operation ascribed to it upon the pleadings? I know none; and I mention this, because if it be intended to carry this case to a court of error, it is desirable

v. *Loveden*. (a) The express liberty here, is, for Sir *Thomas* and his heirs, and his and their assigns and servants, *during the time that he and his heirs should continue owners of the demesne lands of Farnley*, to sink pits, to sough and get the coals, and sell and carry away the coals, or otherwise to dispose of them at their wills and pleasures; Sir *Thomas* and his heirs making such satisfaction to the Earl, his heirs, and assigns, as two gentlemen neighbours, to be indifferently chosen by them, their heirs, and assigns, should award. It may be taken as clear, that an express liberty does not always control what would otherwise exist, especially if the express liberty goes beyond what would be implied. To give it a controlling power, the intention that it should have that effect must be very plain. *Stukeley v. Butler* (b) is a strong authority upon this point. In that case the Earl of *Sussex*, as lord of the manor of *Cleave*, had demised certain woodlands of that manor for three lives, (excepting all timber trees,) and then he bargained and sold to one *George*, all the trees growing in and upon his manor of *Cleave*; and he covenanted, that *George* and his assigns, *during five years*, might sell and carry the trees without interruption of the Earl or any others, and might make saw-pits, and square and cut the timber upon the ground during the said term; and *George* covenanted to fill up the pits and make all things fair, and amend the fences that should be broken during the said term. The grant to *George* was general, not fixing any limit within which he was to cut the trees: he did not cut them till after five years from the time of the bargain and sale; and an action of trespass being then brought,

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(a) *Ld. Raym.* 267.(b) *Hobart*, 168.

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one question upon a special verdict was, whether the covenant on Lord *Sussex's* part, that *George* might take the trees within the five years, should so check and control the grant that he might not take the trees after the five years; and Lord *Hobart*, who reports his own opinion, held clearly that it did not, but that as the trees were absolutely given, *George* and his assigns might take them when they would. And his opinion is founded upon two reasons which are strongly applicable to the present case. First, he says it is clear, that by the grant of the trees by tenant in fee-simple, they are absolutely passed from the grantor and his heirs, and vested in the grantee, and go to his executors or administrators; and the grantee hath power incident and implied to fell them, when he will, without any other licence, which (*i. e.* the power incident and implied) can never be restrained by a power given by the grantor in the affirmative, which grantee had before. He then cites 8 *Ass.* 10. and *Dy.* 19.; and refers to the known rule, that statutes that are taken by intent, shall not by an affirmative take away a former power. The case in 8 *Ass.* 10. was strong. Ten marks of rent were granted to husband and wife: and

hedges growing on the land, by assignment of lessor's bailiff; and whether the lessee might take the thorns without such assignment, was the question. And it seemed to *Baldwin* and *Fitzherbert* that he might, because the law gave him the right by implication in the lease. Lord *Hobart*'s second reason is this, that the covenant on the Earl's part had its necessary use, though it worked nothing in the restraint of the time for felling; for it gives power to dig and make saw-pits, and square the timbers there, which the grantee could not have done without such special warrant. And it contained a general warranty, that the grantee might take the timber without the interruption of any person or persons whatsoever. Apply both these reasons to the case in question: first, the exception here is by tenant in fee, to himself and his heirs; it therefore retains the coals in him and his heirs in fee-simple, with power incident and implied (as they are absolutely excepted) for him, his heirs, and assigns, to take them away when they will: *and this power cannot be restrained by a special power given in the affirmative.* As to the second, the special power here also hath its necessary use, for it goes beyond the incidental power which the law would imply. The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals; it would allow no use of the surface, no deposit upon it to a greater extent or for a longer duration than should be necessary, no attendance upon the land of unnecessary persons. It would be questionable at least, whether it would authorise a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the coals. The express power gives great latitude in these respects. It author-

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ises Sir *Thomas* and his heirs, at their will and pleasure, to dig pits and sough, to sell and carry away, or otherwise to dispose of. It removes the question, upon the making a new pit or sough, whether such pit or sough was necessary: it allows the selling and carrying away, or otherwise disposing of; and consequently warrants a deposit and continuance upon the land for the purposes of sale, and authorises the introduction of customers for the purposes of sale. It has, therefore, its necessary use, in the language of Lord *Hobart*, though it work nothing in restraint of the incidental right which Sir *T. D.* and his heirs would otherwise have had. This case, therefore, is, as it seems to me, a strong authority against the point for which the plaintiff contends, the narrowing and restraining the general exception by the words of the express power; and the case of *Hodgson v. Field* (a) is also a strong authority to the same effect. There, liberty was granted to carry a sough to a colliery, and to make two sough pits in given parts to carry up the tail of the sough: those pits were accordingly made; and after some time a new pit being necessary to repair the sough, the grantee made it, and trespass was brought

But whether the express liberty in this case has or has not restrained the incidental right, we are of opinion, that upon the true construction of the deed, even if we are at liberty to assume that the plea stated its very words, the express liberty is still a subsisting liberty; and that, under that liberty, the first justification may well be supported. It cannot be collected from the feoffment that it was the intention of the parties to limit and restrain the liberty to the period that the *Farnley* demesnes should continue in the heirs of Sir *Thomas* in a course of descent. To restrain what is *primâ facie* unlimited, the words should be plain and the intention clear. The limitation in the express power in this case is, during the time that Sir *Thomas D.* and *his heirs* should continue owners and proprietors of the demesne lands of *Farnley*; and the question immediately occurs, what is meant by the expression “Sir *Thomas D.* and *his heirs*?” If these words are used in the most restrictive sense, the liberty would end the moment the demesnes were diverted from a course of descent; and what the law generally leans against, viz. a restraint upon alienation, would, without any very clear motive, be encouraged. The moment a settlement or a devise was made, the course of descent would be broken, and the liberty would cease. Can any rational ground be suggested for such a provision? If the object were to secure the working out the mines within some reasonable time, why not specify the period? why leave its continuance to an event which might not happen for many generations, or might occur within the shortest space? why put so capricious a check upon the ordinary arrangements applicable to estates? If the word “heirs” is used in this sentence in its ordinary extensive sense,

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 in the exception, to Sir *Thomas* and his heirs, it
 would include assigns as well as heirs; the express
 power would continue as long as the coals and the
demesnes belonged to the same person, whether by de-
 scent from Sir *Thomas* or by purchase, and would
 therefore still be a subsisting power; and it is in this
 sense, we are of opinion, the words were intended to be
 used. The stress laid in the argument upon the in-
 sertion of the word "*assigns*" in some parts of this feoff-
 ment, and the omission of it in others (assuming that
 the pleas state the very words of the feoffment) appears
 to us to furnish no solid or safe ground to regulate our
 decision. It is inserted in the exception as to the
tithe; but it is uselessly inserted there. Without that
 word the exception would have enured, not merely to
 Sir *Thomas* and his heirs, but to his and their assigns.
 It is omitted in the exception, as to the coal: it was un-
 necessary there; and why may not the framers of the deed
 have credit for knowing that it was useless? Is it a safe rule
 of construction to say that the introduction of an useless
 word in one clause and the omission of it in another will
 justify the putting different constructions upon the two

by such *assignee*, but the satisfaction is, according to the words of the feoffment, to be by Sir *Thomas* and his heirs. Again, satisfaction is to be paid to the Earl, his heirs, and *assigns*, but for what damages? for such damages as he and *his heirs* should sustain. So that if the Earl were to alien in fee, and his alienee were to sustain damage, there would be no words, were the letter to be adhered to, to give him satisfaction, because the damages would not be sustained by the Earl or his heirs. This is sufficient to shew that no safe reliance can be placed upon the insertion or omission of the word "*assigns*," and furnishes ground for supposing that the word "*heirs*" is used in its larger sense, so as to include assigns. Upon the whole, therefore, we are of opinion, that the defendant, Mr. *Armitage*, is entitled to the coals: and if he is not entitled to the incidental right of getting them, we think that he is still entitled to the liberty expressly reserved by the feoffment, because the defendant, to whom the coals belong, is also owner of the demesnes; and though they have not come to him by descent from Sir *Thomas*, we are of opinion that the liberty is not confined to those who take by descent, but enures also to those who take by purchase. The consequence is, that upon both the pleas there must be judgment for the defendant.

Judgment for defendant.

See in 2 *Cruise's Dig.* tit. xiii. c. 2. s. 6, 7, 8. the cases where persons, having an interest in a condition, or in the land to which it relates, may perform the condition, although not named in it.

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Earl of St. GERMAINS *against* WILLAN and
Another, Executors of J. WILLAN.

Plaintiff demised by indenture to B. (defendants' testator), certain premises to hold for eleven years from the 29th of September, 1809. B. covenanted, amongst other things, that he would not, during the lease, sell or convey away from the premises any of the straw which, during the leased term, should grow upon the premises, (except wheat-straw and rye-straw); and that for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the thereby leased term, he (B.) would bring back a cartload of dung, and plaintiff covenanted

COVENANT on an indenture, whereby the plaintiff demised to J. Willan (the testator) certain premises, to hold from the 29th of September, 1809, for eleven years thence next ensuing: and J. W. covenanted that he would not, during the lease, sell or convey away from the premises any of the straw, which, during the thereby leased term, should grow upon the premises, except wheat-straw and rye-straw, or sell or convey away any of the dung, which, during the thereby leased term, should arise from the said premises, except the dung, &c. made of the straw, &c. grown in the last year before the expiration of the term thereby leased, which he, J. W., would leave in the yards belonging to the farm-houses, on or before the first day of May in such last year, for the plaintiff or other person next entitled to the

thereby leased term, he (B.) would bring back a cartload of dung, and plaintiff covenanted

possession of the premises; and that, for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the thereby *leased term*, he, *J. W.*, should and would bring to the premises one large cartload of rotten dung, or other good and proper manure, and spread the same in an husbandlike manner. And the plaintiff covenanted, that it should be lawful for the testator to have the use of the barns, &c. for the receiving of his crops of corn, grain, and hay, which should grow upon the premises in the last year before the end, expiration, or sooner determination of the term thereby granted, and for thrashing out the said crops of corn and grain, and for spending of the straw, hay, and stover which should arise therefrom, with cattle, (wheat-straw and rye-straw excepted,) until the first day of *May* next after the expiration of the said term, without paying any rent for the same; he, the said testator, leaving all the muck, &c. arising from such corn, grain, and hay, for the use of the persons entitled to have the premises immediately expectant on the determination of the said lease. Breaches: First, that the testator *during the said lease*, and before the 1st day of *May*, 1821, to wit, on 30th of *September*, 1820, and on divers days between that day and *May* 1st, 1821, did sell and convey away from the premises a large quantity of straw, not being wheat-straw or rye-straw, which grew upon the farm. Secondly, that *J. W.*, *during the said lease*, to wit, on, &c. (as before) did sell and convey away a large quantity of dung, which arose and was made on the said leased premises. Thirdly, that a large quantity of dung, &c. was made in the last year before the expiration of the term leased by the said indenture; but that *J. W.* did
not

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not leave it in the yards belonging to the farm-houses for the use of the persons next entitled to the possession of the premises. Fourthly, that *J. W.* did, during the said leased term, to wit; on September 30th, 1820, and on divers other days between that day and May 1st, 1821, remove off from the premises large quantities, to wit, 10,000 loads of hay, 10,000 loads of wheat-straw, and 10,000 loads of rye-straw, which had grown on the premises during the term, yet did not bring back a large cartload of rotten dung for each load of hay and straw. Fifthly, that although *J. W.* had the use of the barns, &c. until May 1st, next after the expiration of the said term; and although a great quantity of oat-straw, pea-straw, hay, and clover, did grow and arise upon the premises, from which a great quantity of dung was made, yet he did not leave the same upon the premises for the use of the person entitled to them immediately on the determination of the said lease. Pleas to first and second breach, denying that *J. W.* did the acts alleged; to third breach, that he did leave the dung in the farm-yards, for the use of the person entitled, as in the indenture mentioned. Fourth plea, to so much of the fourth breach as relates the removing off, by *J. W.*

first, second, third, fifth, and that part of fourth breach which relates to the removing of hay, &c. *during the said leased term*, a release of all causes of action, claims, &c., except such claim as plaintiff had in respect of *J. W.* not bringing back to the premises dung and manure for the hay, &c. removed after the 29th day of *September*, 1820. Replication, taking issue on the first five pleas; joinder in demurrer to the fourth breach, and general demurrer to sixth plea. Joinder in demurrer to that plea.

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F. Pollock, for the defendants. There lease is a sufficient answer to the first, second, third, and fifth breaches. The only question is, whether it be an answer to that part of the fourth breach to which it is pleaded. [*Bayley J.* If it is not an answer to that, it is bad as to all.] The breaches are in their nature several; and the plea of release may be considered as a separate plea to each respectively, although it is not set out several times over. The fourth breach is, for not bringing back a load of manure for every load of hay, wheat-straw, and rye-straw, carried off the farm during the *leased term*. Now the lease contemplated the ending of the term on the 29th of *September*, 1820, and merely gave a licence to use the premises subsequently to that date. There was no engagement to spend wheat-straw and rye-straw on the farm; that, therefore, might be carried away: and there was no obligation to bring back manure for that which was carried away after the expiration of the term. The sixth plea is therefore good; and on the demurrer to part of the fourth breach, the defendants are also entitled to judgment. The words *leased term*, in that breach, being
under

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under a videlicet, would not confine the proof to the 29th of *September*, 1820; but the plaintiff has no right of action for that which his breach charges, if done after that time. The defendants, therefore, could not take issue upon the whole of the breach, but were obliged to demur to that part of it which would have let in evidence of acts done after the expiration of the term granted by the lease.

BAYLEY J. It is a well-known rule of pleading, that if a plea does not answer all that it professes to answer, it is altogether bad. If then this plea of release is insufficient as to one breach, it is bad as to all. Now the term granted by the lease was, for certain purposes, to continue until the 1st of *May*, 1821, although for others it terminated on the 29th of *September*, 1820. That a term may be so extended is clear from the cases of *Wigglesworth v. Dallison* (a), and *Beavan v. Delahay*. (b) If the owner of land consents by deed that another person shall occupy the land for a certain time, that is a lease. The true construction of this instrument is, that the term was not to end, for every purpose, until the 1st of *May*, 1821. The release is not then an

of *September*, 1820, the plaintiff's right could not be extended by an allegation that certain things were done after that time. The plea is, to all acts done during the *leased term*; that embraces the whole term, whatever it might be. As that plea answered the whole breach, the demurrer to the residue cannot be good. The defendants' demurrer must, for these reasons, be overruled, and the plaintiff's allowed.

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HOLROYD J. The *leased term*, for some purposes, continued until the 1st of *May*, 1821, although for others it ended in *September*, 1820. The whole of the fourth breach was, therefore answered, by the first plea to it, whether the term was extended or not. The defendant's demurrer is, consequently, bad. As to the other point, I think that the plea of release is not an answer to that part of the fourth breach which it professes to answer. A vast variety of cases shew, that a plea not answering the whole that it professes to answer is bad in toto, whether it be pleaded to various facts in one count, or to various counts, or as a ground of defence for various persons.

BEST J. concurred.

Judgment for the plaintiff on the demurrer to the sixth plea; and defendant's demurrer to fourth breach overruled. (a)

Chitty was to have argued for the plaintiff.

(a) See 1 *Wms. Saund.* 27. n. (2). *Moravia v. Sloper*, *Willes*, 50. *Morie v. James*, *Willes*, 122.

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**The KING against The Inhabitants of BAW-
BERGH.**

The statute
56 G. 3. c. 139.
s. 1. requiring
that the order
of justices for
the binding out
of parish ap-
prentices shall
be referred to in
the indenture
by the date
thereof, is com-
pulsory; and
therefore an
indenture, in
which the date
of the order
is omitted, is
void, and no
settlement is
gained by serv-
ing under it.

UPON an appeal against an order of justices for the removal of *W. Pease* from the parish of *St. Andrew*, in the city of *Norwich*, to the parish of *Bawbergh*, in the county of *Norfolk*, the sessions confirmed the order, subject to the opinion of this Court, on the following case. *W. Pease* was an illegitimate child, born in *Great Melton*, in *Norfolk*; and by an order of two justices, bearing date the 11th day of *May*, 1819, and made under the provisions of stat. 56 G. 3. c. 139., and an indenture, not stamped, was bound an apprentice. The order of justices was set out at length; and the indenture of apprenticeship stated, that the churchwardens and overseers, by and with the consent of two justices for the county of *Norfolk*, whose names were thereunto subscribed, bound *W. Pease*, a poor child, as an apprentice, for the term of seven years, &c.; but the indenture did not mention the date of the order of justices, nor did it appear whether they signed the in-

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order of justices shall be delivered to the overseer, as the warrant for binding the child apprentice; and that such order shall be referred to in the indenture by the date thereof; and that *after* such order shall have been made, the justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by the other parties. This section does not absolutely avoid the indenture, but is only directory. The fifth section enacts, that no settlement shall be gained, unless such order shall be made, and *such* allowance of *such* indenture shall be signed as hereinbefore directed. The object of the statute was, that parish apprentices should not be bound without the consent of two justices. Here, the provisions have been substantially complied with; the order was duly made, and the allowance of the indenture signed by the magistrates. It is not necessary that the allowance should be under their hands and seals. The eleventh section does indeed enact, that no indentures, by reason of which any expense shall be incurred to the parish, shall be valid, unless approved of by two justices, under their hands and seals; but that section applies to cases where the parish officers help the parent to bind out the child, and not where the whole expense falls upon the parish. Here, the parish officers paid the whole 10*l.* As to the objection, that it does not appear whether the magistrates signed the indenture before the other parties, it is sufficient to say that every thing must be presumed to be rightly done unless the contrary appear. The statute of the 5 *Eliz. c. 4. s. 25.* directs that the binding in such cases as are within that act shall be for seven years; and section 41. declares that all indentures otherwise than is by that statute ordained, shall be clearly void in law to all intents and purposes:

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purposes: yet a binding for four years confers a settlement, because the indenture is not absolutely void, but only voidable if the parties themselves think fit to take advantage of it. *St. Nicholas v. St. Peters.* (a) *Rex v. Evered.* (b) In like manner, this indenture might be voidable, but was not absolutely void; and therefore service under it conferred a settlement.

Robinson, contra, was stopped by the Court.

BAYLEY J. I am of opinion that this indenture is void, and consequently that no settlement was gained in the parish of *Bawbergh*. The statute of the 56 G. 3. c. 139. has introduced a variety of new regulations as to the mode of binding out parish apprentices. It requires that the child shall be carried before two justices, and they are to enquire into the propriety of binding such child apprentice to the person to whom it shall be proposed by the overseers to bind him; and if the justices shall, upon the enquiry, think it proper that the child shall be bound apprentice to such person, the statute then enacts that the justices shall make an order, declaring that such person is a fit person to whom the child may be bound as apprentice, and shall thereupon order that the overseer of the place to which the child shall belong shall be at liberty to bind such child apprentice accordingly; which order shall be delivered to such overseer as the warrant for binding such child as aforesaid, and such order shall be referred to by the date thereof and the names of the said justices, in the indenture of apprenticeship of such child; and after

(a) *Burr. S. C.* 91. 2 *Boll.* 363.

(b) 1 *Boll.* 534.

such

such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by any of the other parties thereto." The statute requires specifically that the order should be referred to by the date; and the object of that might be, that the order might be found with facility at any future period. The statute then requires that the justices shall sign the allowance of such indenture. Now, the word "such" is not immaterial; and the reference to the order by date is either directory only, or it is of the essence of the indenture. I am of opinion that it means such an indenture as was before required, viz. one containing the date of the order of justices. The fifth section then enacts, that no settlement shall be gained by any child who shall be bound by the officers of any parish, &c., by reason of such apprenticeship, unless such order shall be made, and such allowance of such indenture shall be signed as thereinbefore directed. There must, therefore, be an allowance, not of such indenture, but of such indenture as was thereinbefore directed, viz. of one referring to the order of justices by the date thereof. I doubt whether the eleventh section applies to such a case as the present, or whether it applies only to such cases where the binding is by the parents, and not by the overseers; but I am clearly of opinion that, construing the first and fifth sections together, this indenture is void, and that no settlement was gained in the parish of *Bawbergh* by the service under it.

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BEST J. The first and the fifth sections are to be taken together, and then there can be no doubt that a settlement was not gained in the parish of *Bawbergh*, be-

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cause in the indenture the order of the justices was not referred to by the date. Such indenture means the indenture before spoken of.

Order of sessions quashed.

The KING against MOSLEY, Bart.

By the Man-
chester and Sal-
ford Police
Act, 32 G. 3.
c. 69. rates
were to be made
upon "the
tenants or oc-
cupiers of all
messuages,
houses, ware-
houses, shops,
cellars, vaults,
stables, coach-
houses, brew-
houses, and
other buildings,
gardens or gar-
den-grounds,
and other tenements situate
within the
towns of M.
and S. respect-
ively." Held,
that the owner

UPON an appeal against a rate made on the defend-
ant under the *Manchester and Salford* police act,
32 G. 3. c. 69., in respect of "market sites, streets,
lands, and tenements, at the market-place, *Shude-hill*,
Smithy-door, and at various other streets in *Manchester*,
and the tolls, dues, rates, and profits in respect thereof."
The sessions confirmed the rate, subject to the opinion
of the Court on the following case. "The assessment
and rate appealed against were duly made and allowed
according to the requisites of the act. The markets for
which the rate was imposed are held in the several
places named, which are public streets in *Manchester*,
and the public have a right to pass and repass over the
same, subject to the right of holding the said markets

provided by themselves, and are either carried by them, or are placed upon the pavement of the said markets, but are not fastened to the ground.

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J. Williams and *Starkie*, in support of the order of sessions, contended that the word *tenement*, as used in the act in question, was large enough to embrace the subject-matter of this rate. But the Court said, that the meaning of the word *tenement*, as used in this act, had been under their consideration on a former occasion; and that they were satisfied that it was intended to be applied to those things only which were *ejusdem generis*, with those particularly enumerated, and was not intended to be used in the larger sense sometimes given to it; that the subject of the present rate, not being of the same nature as any of the descriptions of property specified in the act, was not liable to be rated; and that the order of sessions confirming the rate must therefore be quashed.

Order of sessions quashed.(a)

Littledale and *Park* were to have argued against the rate.

(a) See *Rex v. Company of Manchester Water Works*, ante, vol. i. p. 630.

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**The KING *against* The Justices of the West
Riding of YORKSHIRE. (a)**

By the eighth section of the General Inclosure Act, (41 G. 3. c. 109.) when complaints are made against public roads set out by a commissioner, he and a justice are to hear them, and finally direct what is to be done; and by the tenth section, private roads are to be set out, subject to the same provisions as are contained in the eighth section respecting public roads. A private inclosure act, in which the General

IN Easter term last, *Scarlett* obtained a rule for a mandamus to the justices of the West Riding of Yorkshire, commanding them to enter continuances and hear an appeal under the following circumstances. The commissioner appointed by a private act of parliament, 1 & 2 G. 4. c. 31., "For inclosing lands in the manor of *Whitley*, in the parish of *Kirk-heaton*, in the West Riding of the county of *York*," had, pursuant to the provision contained in the 41 G. 3. c. 109. ss. 8 & 10., set out a private road over the lands directed to be inclosed. An objection having been taken to this road, a meeting was duly holden, according to the directions of the general inclosure act, before the commissioner and a justice of the peace, who, on the 19th of Feb. 1823, jointly made an order that the said road should be disallowed. Against this order the parties aggrieved appealed to the next sessions for the West Riding of York-

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Littledale and *Blackburn* now shewed cause. The private act, 1 & 2 G. 4. c. 31., gives an appeal in those cases only where the acts of the commissioner are not declared to be final by that or the general inclosure act. (a) Now, the 8th section of the latter statute says, that when complaints are made against public roads set out by a commissioner, he and a justice shall hear them, and *finally direct* what is to be done. The 10th section enacts, that private roads shall be set out, subject to the same provisions as are contained in the eighth section respecting public roads; the whole of the latter section must therefore be taken to be embodied in the tenth. The proviso at the end of the eighth section shews clearly that the order of the commissioner and justice was in general to be conclusive; for it provides, that in one particular case, viz. that of stopping up a road through old inclosures, there shall be a right of appeal. That provision would have been quite unnecessary, unless the order would, but for that, have been final. The construction now contended for was put upon this part of the statute by this Court, in

(a) The appeal clause referred to was as follows: "And be it further enacted, that if any person or persons shall think himself, herself, or themselves aggrieved by any thing done, or omitted to be done, in pursuance of the said recited act, or of this act, (except as to such acts, determinations, or proceedings of the said commissioner as are by the said recited act, or this, directed to be final, binding, or conclusive; and also except as to such claims, objections, matters, and things as by this act are directed or authorised to be ascertained, settled, tried, or determined by the verdict of a jury,) he, she, or they may appeal to the general quarter sessions of the peace to be held for the West Riding of the county of York, within four calendar months next after the cause of complaint shall have arisen; and the said court of quarter sessions are hereby authorised to determine such appeal, and to award such costs as to them shall seem reasonable; which determination shall be final and conclusive, and shall not be removed or removable by certiorari, or any other writ or process whatsoever."

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Rex v. Commissioners of Dean Inclosure. (a) It may be urged that the act gives an appeal, except where the acts of the *commissioner* are declared to be final; and that this was a joint act of the commissioner and a magistrate. But the act does not state that the commissioner must act alone to be within the exception from the appeal clause; and by the 8th section of the general inclosure act, the commissioner and magistrate together are finally to direct how the roads are to be set out. Besides, the proceeding before the magistrate and commissioner is in the nature of an appeal; and therefore, to hold that the matter may be re-agitated at the sessions, would be giving appeal upon appeal. That could not have been the intention of the legislature; this rule must therefore be discharged.

Scarlett, (with whom were *Tindal* and *Alderson*,) contra. The expression in the 8th section of the general inclosure act is, that the magistrate and commissioner shall *finally direct* what is to be done. It does not say that their order shall be "binding, final, and conclusive," which are the words of the exception in the

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It may be observed as to that, that the 10th section contains other provisions, not in the 8th, which weakens the inference. But inference is not enough; the appeal once expressly given, can only be taken away by express words. *Rex v. The Commissioners of Dean Inclosure* is distinguishable; there the appeal clause in the local act differed from the present. There the exception was, "other than and except such determinations as are by this or the said recited act declared to be final." Here, the exception is only of such determinations of the commissioner as are declared to be final. Now this order was not a determination of the commissioner, but of a justice and the commissioner, overruling the previous determination of the commissioner. (He was then stopped by the Court.)

ABBOTT C. J. That certainly is so; the exception in the appeal clause of the private act does not mention acts done by justices. Now the order in question was made by a justice, together with the commissioner appointed by the act. Besides, the 10th section of the general inclosure act does not at all mention the right of appeal, nor expressly make the decision of the commissioner final in the case of private roads. Here, the right of appeal is expressly given, and I think we are not warranted in saying that it is taken away in this case by the subsequent exception. I think, therefore, that this rule must be made absolute.

Rule absolute.

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MORRIS against JONES.

It was agreed between the grantor of an annuity and the grantee, that the latter should advance a specific sum of money upon annuity, (to yield to the grantee 7 per cent. per annum,) secured upon landed estates, of which the grantor was tenant for life, and that for securing the sum advanced, certain policies of assurance already effected on his life, should be assigned to the grantee. The annual premiums of these policies were considerably

EVANS had obtained a rule nisi for setting aside the warrant of attorney given for securing an annuity, and the judgment entered up thereon, and the writ of *elegit* issued in pursuance of the judgment. The affidavits in support of the rule stated, that by an indenture of the 1st of *May*, 1818, in consideration of 11,000*l.* paid by *Morris* to *Jones*, the latter granted to the former an annuity of 1429*l.*, and for further security executed a warrant of attorney, by virtue of which judgment was afterwards entered up in *Trinity* term, 58 *G. 3.*; and that for the consideration mentioned in the indenture as the consideration for granting the annuity, *Jones*, by another indenture of the same date, assigned to *Morris* three policies of assurance effected upon his, *Jones's* life, to the amount of the 11,000*l.*; and that those policies, at the time of the assignment, were of the actual value of 1135*l.*, and would have been purchased at that price by the different companies with whom the same had been

parties, that the policies should be assigned; and that it was partly in consideration of such assignment that *Morris* had agreed to give the 11,000*l.*: and that no memorial of the assignment of the policies was enrolled in the Court of Chancery. The affidavits in answer to the rule stated, that in 1817 a proposal was made to *Morris*, on the part of *Jones*, to advance 11,000*l.* upon an annuity which was to yield 7 per cent. clear, and to be secured upon landed estates of which *Jones* was tenant for life; and it was expressly stated, that *Jones's* life was then insured for 11,000*l.*, and that the policies would be assigned to the grantee of the annuity, to be re-assigned by him whenever the annuity was redeemed. The affidavits further stated, that in the negotiation for the annuity, it was expressly stipulated, that *Morris* was not to be at liberty to surrender or sell the policies, but that in the event of the annuity being redeemed, they were to be re-assigned; that they were of no pecuniary value to him, and that he would have refused to purchase them if *Jones* had offered them for absolute sale. In a letter written, pending the negotiation for the annuity, by the solicitor of *Jones*, and which accompanied the abstract of his title to the estate upon which the annuity was to be secured, it was stated, that the 11,000*l.* was to be advanced for an annuity of 7 per cent., in addition to the premiums of insurance upon *Jones's* life, upon which policies to that amount had already been effected, and would be assigned to the party making the advance; and the premiums upon those policies were stated to amount to 659*l.*; which sum, added to 770*l.*, the amount of the annuity at 7 per cent., made together 1429*l.* The deed by which the annuity was granted, as well as that by which the policies were assigned, were annexed to the affidavits.

It

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It appeared by the former, that the annuity was granted for sixty years, if *Jones* should so long live, and charged upon certain landed estates in the county of *Monmouth*, of which *Jones* was tenant for life; and these estates were by the deed conveyed to trustees for ninety-nine years, if *Jones* should so long live, upon trust for better securing the annuity; and the annuity was to be redeemable at three months notice, upon payment of 11,350*l.*, and all arrears and costs. By the deed of assignment it appeared, that two of the policies had been effected in *April*, 1818, and the other in *June*, 1818; and it was stipulated, that if *Jones* should redeem the annuity, *Morris* should re-assign the policies to him. It did not contain any express covenant by *Jones* or *Morris* to keep up the insurance.

The *Solicitor-General* (and *Tindal* was with him) now shewed cause. The policies were not purchased by the grantee of the annuity. They were assigned to him by a different deed, as a collateral security only for the payment of the purchase-money, in the event of the death of the grantor. The statute 53 G. 3. c. 141. does not require that there should be a memorial of every



the life of the grantor, at a less annual premium than if he had effected new policies on his life. It appears by the affidavits that the grantee saved by this arrangement an annual expence of 85*l.*; that was part of his purchase, and the 11,000*l.* was the consideration for that and the annuity. The true consideration, therefore, is not stated in the memorial. They cited *Byne v. Vyvian.* (a)

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ABBOTT C. J. I am of opinion that all has been done in this case which is required by the 53 G. 3. c. 141. s. 3. If more is required to prevent the mischiefs contemplated by this statute, that must be provided for by a new act of the legislature. The statute, in one view of it, is remedial, and in another penal, for it makes void all the securities. When questions on the former annuity act first came before the Court, the act was considered to be wholly remedial, but in progress of time the Court considered it both penal and remedial. At one time it was thought that every trust should be set out in the memorial; but that is not necessary. The question now is, what does the 53 G. 3. c. 141. s. 2. require. It enacts, that "within thirty days after the execution of any deed, &c. whereby an annuity may be granted, a memorial shall be inrolled, and that the memorial shall, among other things, contain the *pecuniary* consideration or considerations for granting the annuity in the form or to the effect following." Then follows a general form of the memorial, and one of the columns is headed, "Consideration, and how paid;" and under it are the words "100*l.* in money, so much in notes or bills of exchange." It appears, therefore, both from the words

(a) 5 Ves. 604.

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of the enacting clause, and from the general form of memorial given, that the *pecuniary* consideration is the only consideration contemplated by the legislature; and in this case the pecuniary consideration mentioned in the deed is stated in the memorial. But it is said, that the consideration for granting this annuity is not truly set out in the memorial, inasmuch as the sum of 11,000*l.* was paid, partly for the purchase of the annuity, and partly for the assignment of the policies, which had been effected some years before; and it is urged, that the grantee by such assignment actually derived a present pecuniary benefit, because he was thereby enabled to insure the life of the grantor at a less annual premium than he otherwise could have done. Now, when an annuity is granted for the life of the grantor, it is almost the invariable practice for the grantee to insure the life of the grantor; and in calculating the amount of the annuity or the consideration to be paid, regard is always had to the terms on which that life can be insured. The amount of the premium depends upon the age of the grantor, and the state of his bodily health; yet neither of those circumstances are ever mentioned in the memorial. And in this case, the purchaser must be con-

purchase of the policies: the assignment was only for the security of the purchase-money, in the event of the death of the grantor. I think that we should introduce too much subtlety into the construction of this act, if we were to hold that this assignment ought to be stated in the memorial. We might next be called upon to set aside securities for an annuity, upon the ground, that the consideration was calculated with reference to a representation of the bodily health of the party for whose life the annuity was granted, which representation afterwards turning out to be unfounded, the grantee was enabled to insure the life at a much less annual premium than that which the parties calculated as the amount of the premium at the time when the consideration was paid. I think this objection ought not to prevail. This rule must, therefore, be discharged.

BAYLEY J. I think that the annuity act does not apply to the deed by which the policies were assigned to the purchaser of the annuity. Looking to the substance of the transaction, the object of one party was to grant, and of the other to purchase an annuity. The money to be paid for the purchase of such annuity was 11,000*l*. That sum came out of the hands of the grantee, and he was to receive 7 per cent. per annum besides what would be sufficient to cover the annual expense of insuring the life of the grantor. The annual payment to be made by the grantor was, with reference to that expense, fixed at 1429*l*. Now, if the sum of 11,000*l*. can properly be considered as the consideration for the purchase of the annuity, the consideration is properly set out in the memorial. The
argument

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argument is, that the 11,000*l.* was paid for the purchase of the annuity, and of something else; and it is suggested, that, in consideration of the grantor's having assigned the policies to the grantee, the latter was enabled to effect the insurances at a less premium than he otherwise could have done; and, therefore, that the 11,000*l.* was in fact paid for an annuity of 1429*l.* per annum, and the present pecuniary value of the policies assigned, or at least of that benefit which the grantee derived by paying a less premium than he otherwise would have done. But I think that that is not the true statement of the contract. The object of the grantee was, the purchase of an annuity, and nothing else. The result would have been the same to the parties, whether new policies were effected, or the old ones were assigned; for if the premium of insurance had been higher, the annual payments would have been so much the greater. The parties were stipulating, not for the purchase of the policies, but of an annuity, and the consideration to be paid for that annuity was fixed in the first instance. The policies were only a collateral security for the payment of the purchase-money in the event of the death of the grantor. For these reasons, I am of opinion that

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there pointed out with respect thereto, should be stated in the memorial. It is sufficient if all these things have been mentioned in the memorial; and although in the course of the transaction some further act may have been done, for the more easily enabling the purchaser of the annuity to secure to himself the repayment of his purchase-money, in case of the failure of the annuity by the death of the grantor before its redemption, that act is not required, I think, to be noticed in the memorial. Now here, the memorial does contain the date of the deeds whereby the annuity was granted, the names of all the parties and witnesses, and the person for whose life it is granted, and the person by whom it is to be beneficially received, and the pecuniary consideration for granting the same, and the annual sum to be paid. It is said, however, that the sum of 11,000*l.* was not the consideration paid for the annuity, but that it was paid as a joint consideration for the purchase of the annuity, and of some interest in the policies. But upon the facts disclosed in this case I think that the 11,000*l.* is to be considered as the consideration paid for the purchase of the annuity only, and that the assignment of the policies was only a further act done for better enabling the grantee to secure the reimbursement of the purchase-money, in case of the loss of his annuity. It appears from the affidavits, that the bargain between the parties was, that *Morris* should advance 11,000*l.* to *Jones*, and that the latter should grant in return an annuity, which was to yield to the former 7 per cent. clear, to be secured upon landed estates, of which *Jones* was tenant for life; and for the purpose of securing the reimbursement of the purchase-money, in the event of the death of *Jones* before redemption, by which the annuity would cease, it was proposed by *Jones* to assign to *Morris* policies

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policies already effected on his life. The mode of calculating the amount of the annuity payments at 1429*l.* was, by adding 659*l.*, the annual premium payable upon the policies, to 770*l.*, 7 per cent. upon the purchase-money. The object of the grantor of the annuity was, to borrow the sum of 11,000*l.* at the smallest annual expense to himself; and for his convenience, the old policies were agreed to be assigned, instead of new policies being effected. The object of the grantee was to purchase an annuity of 770*l.* clear, and nothing else. The amount of the expence of insuring the life of the grantor was wholly immaterial to the grantee, for he was, at all events, to receive a clear annuity of 770*l.* per annum. If new policies had been to be effected at an advanced premium, the annual payments of insurance, and consequently the aggregate annuity of 1429*l.*, would have been proportionally increased; but the consideration to be paid for the annuity was fixed in the first instance. The annual payments were not fixed in the first instance, except that their amount was to be according to what was the amount of the annual expence of insuring *Jones's* life; and the existence of certain policies which enabled the grantee to insure the grantor's life at an annual expence of 659*l.* was the reason for fixing 1429*l.* as the sum to be paid by way of annuity. It is clear, therefore, that the grantee could have no motive to purchase any interest in the policies assigned. They were assigned solely for the benefit of the grantor, to relieve him from a greater annual expence than he would have been subject to by increasing the whole amount of the aggregate annuity, in case those policies had not been assigned, and the grantee had had to make fresh insurances in lieu of having them for his security in the event of the grantor's death before the annuity was redeemed.

redeemed. If the deed of grant had stated that 770*l.* was the annuity granted for a consideration of 11,000*l.* (which is the substance of the transaction), and by a different deed the grantor had covenanted, that he would for further securing the grantee against loss by the ceasing of the annuity granted by reason of the grantor's death, pay to the insurers 659*l.* annually, the amount of premiums upon policies already effected upon his life, or that he would pay that sum to the grantee in order to enable him to keep up the insurances; it would have been sufficient, I think, to state in the memorial, that the 11,000*l.* was the consideration paid for the annuity of the 770*l.*, and the latter deed need not, I think, have been noticed. The parties, however, by reserving annual payments sufficient in amount to enable the grantee to pay the premiums, have done substantially the same thing, although it is not explained upon the face of the deed of grant in what manner that portion of the annual payments beyond the sum of 770*l.* is to be applied. That does sufficiently appear from the affidavits before us. But inasmuch as the act of parliament requires that the annual sums to be paid by the grantor to the grantee should be stated in the memorial, and as 1429*l.* was the annual payment reserved by the deed of grant, it became necessary so to state it in the memorial. I think, however, that the 11,000*l.* was properly stated in the memorial as the consideration actually paid for the annuity granted. That was the only pecuniary consideration paid, and it was paid in one entire sum. It is impossible to say that any specific part of it was paid for the policies assigned. It was paid for an annuity of the amount reserved by the deed, it being also agreed between the parties that the grantee should apply part of

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that annuity towards defraying the expence of keeping up policies of insurance, which, in one event, were to be a security for the repayment of the consideration-money, and in another were to enure to the benefit of the grantor. The assignment of the policies was ancillary to the grant of the annuity, and was merely an act done for further securing the grantee against the loss of the purchase-money of his annuity.

Rule discharged.

Where a warrant of attorney contained a stipulation that execution might issue upon the judgment, after a year and day, without reviver by scire facias, held that the parties might lawfully make such a bargain, and that the execution was good. An application was made to set aside the inquisition taken on an elegit, because it ap-

In *Michaelmas* term, *J. Evans* moved to set aside two writs of elegit and the inquisitions taken thereon, which had been issued on a judgment entered up upon a warrant of attorney, given to secure the above-mentioned annuity. First, on the ground that the judgment was above a year and a day old, and had not been revived by scire facias before the execution issued. The warrant of attorney contained a stipulation that no objection should be taken on that ground; but as at common law, the party, after a year and day, was put to his action on the judgment, and it is only by stat. *Westm. 2. (a)*, that he is enabled to have execution upon it, by suing out a scire facias, the consent of the defendant cannot

Per Curiam. If a party chooses to bargain that execution shall issue on an old judgment without reviver, we cannot say that such a bargain is so unlawful as to justify us in setting aside the elegit. The case of a warrant of attorney given by a prisoner is different, because there the party is acting under duress.

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Upon the other objections a rule nisi was granted to set aside the first inquisition as to the copyhold lands; and the second altogether; against which

Tindal shewed cause, upon affidavits, which denied that any copyhold lands were extended. As to the other ground, the return to the second elegit was altogether void; it was a mere nullity; and the defendant need not have applied to this Court to set it aside. *Fenny dem. Masters v. Durrant. (a)*

Brougham and *Evans*, contra, contended that the latter was a ground for the summary interference of the Court; for that notice had been given to the tenants to pay over their rents to the plaintiff, and although that might be illegal, and the defendant might recover those rents, still he would be much prejudiced.

Per Curiam. The rule must be discharged. It being doubtful whether copyholds have or have not been extended, the Court will not decide that upon affidavits. As to the other point the case cited shews that the second inquisition is void in itself, and that the interference of this Court is perfectly unnecessary.

Rule discharged.

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In the matter of BLANSHARD, BAXTER and
Others.

The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrongdoer and to deliver it to the rightful owner; and therefore, where it appeared upon a rule nisi for a prohibition to restrain the Admiralty Court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it

EVANS, in *Easter* term, had obtained a rule nisi for a prohibition to restrain the Court of Admiralty from proceeding in this cause. It appeared by the affidavits, that, in *October*, 1821, the ship *Partridge*, then being at *Bombay*, was sold by public auction, by order of *Beetham* the captain, to a native merchant there. *Beetham* deposited the certificate of the registry with the collector of the customs at *Bombay*, and caused the same to be cancelled. *Baxter* and *Osborn* purchased the ship of the native merchant and repaired her. She arrived in *London* in *July*, 1822, and *Blanshard* claimed her, and instituted a suit in the Court of Admiralty, for the purpose of recovering possession of the ship, in a cause of possession, and by virtue of a warrant, issued by the authority of the Instance Court, the ship was arrested. A copy of the proceedings in the Admiralty court were

ship, being then worth 10,000*l.*, did proceed to *Madras* and *Bengal*, with a certificate of *British* registry, granted by the commissioners of customs to *Blanshard*, as sole owner ; and having discharged her cargo, *Beetham* took in a return cargo, and while on her homeward voyage, the ship, in *January*, 1821, struck on a shoal, and received some damage, and in consequence put into *Bombay* on the 19th *January*. On the 16th *February* she was put into a dry dock for the purpose of being repaired ; surveys were held, and the surveyors reported, that the vessel, when repaired, would be in a fit state to proceed to *Europe*, and that she was in every way sound and sea-worthy, and worthy to be repaired. *Beetham*, notwithstanding, countermanded the orders for the repairs, and, without any authority from *Blanshard* or his agent, requested *Baxter* and *Osborn*, then merchants at *Bombay*, to make sale of the ship, and in consequence she was sold by public auction on the 5th *March* for 2050*l.*, to a native merchant there. Within two days after such sale, *Baxter* and *Osborn* declared themselves to be the purchasers, and *Beetham* executed to them a bill of sale ; it was further alleged by *Blanshard's* proctor, that when the ship was put up to sale, *Baxter* knew that *Beetham* had no authority to sell, and that the sale was illegal and unnecessary, and that within nine days after the sale, the ship having undergone the necessary repairs, was, by *Baxter*, advertised for a voyage to *England*, but was in fact sent on a voyage to *China* and afterwards to *England*, where she arrived on the 24th *July*, 1822. The necessary repairs might have been done for 1000*l.*, and the money for that purpose might have been raised at *Bombay* by hypothecation and on bottomry. *Blanshard's* proctor then prayed the judge

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1833. to dismiss the bail given in the cause, and to condemn
 In the matter of the other party in expenses.
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Scarlett and *F. Pollock* shewed cause. It appears from the affidavits and proceedings in the Admiralty Court, that *Blanchard* being the sole registered owner of the vessel, *Baxter* and *Osborne* have wrongfully got possession of it; the latter do not appear to claim any title to the ship, non constat therefore, that the Court of Admiralty will be called upon to adjudicate upon such title. There is no ground, therefore, for a prohibition, because it is quite clear that the Court of Admiralty have jurisdiction to take a vessel out of the possession of a mere wrong doer and deliver it to the rightful owner.

Exams, contra. The Court of Admiralty have no jurisdiction in this case, because the contract for the sale of the ship was made upon the land, and not upon the high sea. *Bridgeman's* case (a) is precisely in point. In the *Spanish Ambassador's* case (b) "it was resolved by the whole court that the Admiralty can hold no plea of any contract but such as arises upon the sea, although

taken by a *Spanish* privateer, and before it could reach any *Spanish* port, was driven by the winds into *Weymouth*, and sold there. The *French* owner sued the vendee in the Admiralty Court, on the ground that the captors were pirates. A prohibition was prayed, and *Foster J.* and *Banks C. J.* were of opinion that there ought to be a prohibition, because the sale had been on the land. The case of the *Barbara* (a), *Velthasen v. Ormesly* (b), *Sands v. Child* (c), are authorities for the same position. [Bayley J. It does not appear by the proceedings in the Court of Admiralty, that *Baxter* has ever put in issue the right to the property of the vessel. If he had pleaded that the ship was his, and not *Blanshard's*, your argument might apply. But as far as the proceedings go, *Baxter* appears to be wrongfully in possession of a ship belonging to *Blanshard*, and the latter may have instituted a suit against *Baxter*, for the express purpose of preventing him from carrying the vessel out of the kingdom.] In *Powell v. Robinson* (d), the admiralty had granted a warrant to seize a ship, and before any libel was exhibited, a prohibition was moved for, and it was objected that it ought not to go, because it did not appear that the admiralty had no jurisdiction, but the prohibition was granted. (e)

ABBOTT C. J. As far as the affidavits inform us of the proceedings in the Court of Admiralty, it appears that a suit had been instituted there by *Blanshard*, and that the ship had been seized by virtue of a warrant issued in that cause. *Baxter* and *Osborn*,

(a) 4 Rob. 1.

(b) 3 T. R. 315.

(c) 4 Mod. 176. Sir T. Raym. 489.

(d) Bunb. 9.

(e) See *Roberts v. Cadd*, Bunb. 247.

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by their proctor, then claimed the vessel as owners; and the proctor of *Blanshard* being present, then states facts, from which it appears that *Baxter* and *Osborn* were wrongfully in possession of a vessel of which *Blanshard* was the registered owner, and the proceedings conclude by *Blanshard*'s proctor praying the judge to dismiss the bail, and to condemn *Baxter* and *Osborn* in costs. In this stage of the proceedings, the proctor of *Baxter* and *Osborn* not having pleaded their title to the ship, this rule was obtained for a prohibition. We cannot say what judgment the Court of Admiralty would have pronounced upon the facts alleged; and we are not to assume that that court would have proceeded with the cause if the proctor of *Baxter* and *Osborn* had exhibited articles, and had pleaded their title; and if we made the rule absolute for a prohibition in this case, it must be upon the ground, that the Court of Admiralty have no jurisdiction, in a mere cause of possession, to take a ship out of the power of a wrong-doer and give it to the right owner. Such a jurisdiction, however, has been exercised by that court for a very long period of time. It has been the constant practice in disputes between part-

doubted, there are several authorities (a) recognizing it; and it may now be taken to be settled, that in disputes between part-owners as to the employment of a ship, the Court of Admiralty may arrest and detain the ship, until security be given to the amount of the value of the shares of those part-owners who dissent from the particular employment. Now as part-owners of a vessel have a distinct, although undivided, interest in the whole vessel, they cannot be considered as absolute wrong-doers by the act of using a vessel of which they are proprietors. If, therefore, the Court of Admiralty have jurisdiction to detain the vessel at the instance of one part-owner, until the others give security to the extent of their shares, a fortiori, it must have such a jurisdiction to detain the vessel in a suit instituted by the real owner against a mere wrong-doer; and I must observe, that this proceeding, by which the thing itself is taken out of the possession of a wrong-doer, and put into that of the right owner, is a most useful part of the jurisprudence of the country. Unless it were allowed, a ship-owner might, in many cases, sustain a serious injury and be without any remedy; for if he could only sue the wrong-doer, the latter might be unable to pay the value of the ship, and might, pending the suit, send it out of the country. Inasmuch then as it does not appear by the proceedings, that the Court of Admiralty are about to determine any question over which they have not jurisdiction, I am of opinion that this rule must be discharged.

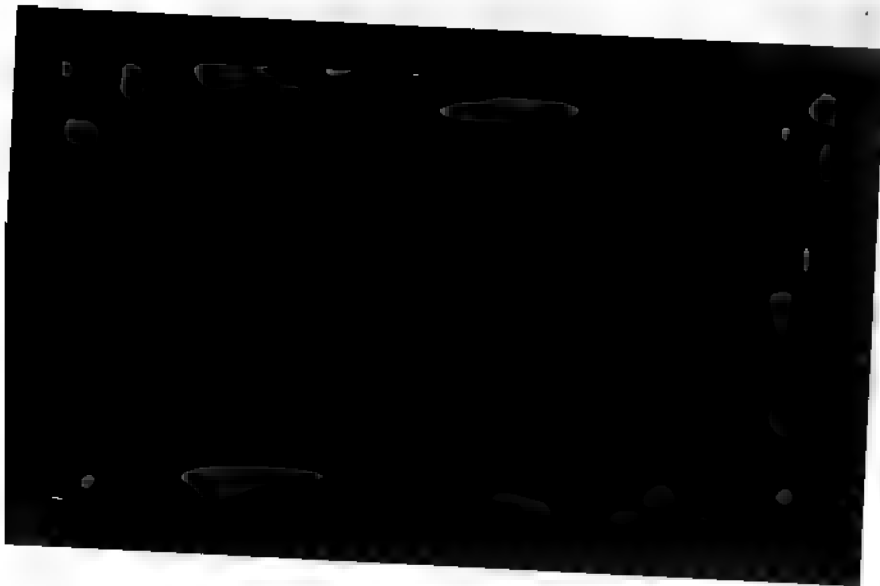
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Rule discharged.

(a) See the cases collected in *Abbott on Shipping*, part 1. chap. 3. 4, 5., and p. 91. 4th ed.

END OF TRINITY TERM.



C A S E S

ARGUED AND DETERMINED

1823.

IN THE

Court of KING's BENCH

IN

Michaelmas Term,

In the Fourth Year of the Reign of GEORGE IV.

BUTLER *against* CAPEL.

Friday,
November 7th.


DEBT on bond. Defendant cravedoyer of the bond and condition, which (after reciting that one *J. W.* had agreed to sell an annuity to plaintiff, and to secure it by a demise and assignment; and in pursuance thereof did, by indenture, covenant to pay the plaintiff an annuity of 150*l.* per annum, which indenture contained a demise of certain leasehold premises therein described,) was for the due payment of the said annuity; and pleaded, first, non est factum; secondly, no memorial of the said indenture enrolled within thirty days after the execution of it, as required by the 53 G. 3. c. 141.; thirdly, that no memorial of the said indenture correctly describing the nature of it, and the property thereby intended

In the memorial of an annuity, enrolled pursuant to the 53 G. 3. c. 141., an instrument was described as an assignment of certain leasehold premises. The instrument was, in fact, an underlease: Held, that the description given was a sufficient compliance with the statute.

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against
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intended to be charged for securing the payment of the annuity, was enrolled as required by the said act. Replication to second and third pleas, that such memorial was duly enrolled, and assignment of breach, non-payment of 225*l.* for one year and a half of the said annuity. At the trial before *Abbott C. J.*, at the *London* sittings before this term, upon the production of the indenture mentioned in the condition of the bond, it appeared that *J. W.*, the grantor of the annuity, was entitled to certain lands, houses, and premises, for the residue of a term of 1000 years; and for securing the annuity, did grant, bargain, sell, and demise the said premises to certain persons therein mentioned as trustees, for and during all the rest, residue, and remainder then to come and unexpired of and in the said term of 1000 years therein, except the last ten days of the said term, yielding and paying a pepper corn rent. The memorial described this deed as "a grant of an annuity of 150*l.*, and an assignment of certain hereditaments and premises for securing the same." For the defendant, it was contended that this was a misdescription of the deed, and did not satisfy the requisites of the 53 G. 3. c. 141. That the annuity was therefore void, and consequently



nants in his under lease; and in this very instance, instead of the original rents, a nominal rent only was reserved by the under lease. This Court has required a very strict compliance with the directions given in the schedule to the 53 G. 3. c. 141. *Smith v. Pritchard*. (a) The indenture is in effect an under-lease, and the memorial improperly describes it as an assignment. The plaintiff has therefore failed to comply with the terms imposed by the legislature, and a nonsuit must be entered.

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against
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Per Curiam. If the plaintiff had in pleading alleged that there was an assignment of certain premises, he would not have proved his allegation by the production of the instrument in question. For, in strict legal phraseology, an instrument does not operate as an assignment unless the grantor parts with the whole of his interest, but in common parlance it is otherwise. Now the schedule of the 53 G. 3. c. 141. requires, that the nature of the instrument should be inserted, and that is satisfied by a description of the instrument in popular language, although that be not according to its strictly legal effect. In *Harrison v. Vallance* (b) the declaration, which was in trover, described a certain deed as "an assignment purporting to be a conveyance;" and it was held to be sufficient, although in fact the conveyance was by lease and release. There is not then any sufficient ground for this motion.

Rule refused.

(a) 5 B & A. 717.

(b) 1 Bing. 45.

1823.

**CLARK against The Inhabitants of the Hundred
of BLYTHING.**

Where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from an insurance office: Held, that he might nevertheless maintain an action against the hundred on the 9 G. 1. c. 22.

CASE on the 9 G. 1. c. 22. to recover from the hundred satisfaction and amends for certain stacks of hay and corn which had been wilfully burnt, in the hundred of *B.*, by some person unknown. The declaration stated the damage to have been done within one year before the commencement of the action; that within two days after the committing of the offence, the plaintiff gave notice of it to three of the inhabitants of *H.*, that being a town near the place where it was committed; and within four days after such notice was given, plaintiff gave in his examination before a magistrate of the county, residing in the hundred of *B.*, by which it appeared that the said stacks were set on fire by some person unknown; and that plaintiff did not know the person who committed the said act. Averment, that six months and more had expired, and that the offender had not been apprehended

entitled to recover. The learned Serjt. overruled the objection, but gave the defendants leave to move to enter a nonsuit. The plaintiff having obtained a verdict,

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BIRMINGHAM.

Storks now moved accordingly. The plaintiff in this action having received from the insurance office the amount of his loss, had not, at the time when the action was brought, sustained any damage by the fire. To allow him to recover in this action, would therefore be contrary to the words and policy of the 9 G. 1. c. 22. s. 7. upon which the action is founded. That section enacts, that the hundred shall make satisfaction and amends to every person for the damage that he shall have sustained by the setting fire to any stack, &c. by any offender against that act. It is manifest that the legislature there contemplated a reparation to the party injured alone, and not to any third person who might have insured his premises. So also, in the 3 G. 4. c. 33. s. 3. & 4. which regulate the mode of recovering the damages occasioned by offences against the 9 G. 1. c. 22., the legislature evidently speak of a recovery by the party whose property is injured or destroyed. In *Hyde v. Coggan* (a) the 1 G. 1. st. 2. c. 5., and 9 G. 1. c. 22., are said to be remedial, to relieve the party injured by the unlawful act. In this case the plaintiff has not sustained any injury, having received the amount of his loss from the insurers, and they cannot sue the hundred in his name. There is indeed a case mentioned in *Marshall on Insurance* (b), *Mason v. Sainsbury*, in which a contrary opinion appears to have prevailed. That was an action on the 1 G. 1. st. 2. c. 5., the plain-

(a) 2 Doug. 699.

(b) V. 2. p. 796.

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ants of
BLYTHING.

tiff had recovered the amount of his loss from an insurance office, for the benefit of which the action was brought in the plaintiff's name, and with his consent; and this Court held that the action was maintainable. That case, however, does not appear to have undergone much discussion, and as there is not any other to be found bearing on the point, it is certainly worthy of further consideration.

ABBOTT C. J. The point upon which this motion has been founded, was decided in this Court many years ago by the case of *Mason v. Sainsbury*. Unless there be some serious doubt as to the propriety of that decision, we ought not now to disturb it. I cannot bring myself to entertain any doubt of its propriety. It is plain that the intent of the legislature in this act, and others of the like nature, was to make the inhabitants of hundreds vigilant for their own sakes, by making it their interest to prevent the commission of offences, and where that could not be done, to exert themselves to bring the offenders to justice. The act in question has provisions applicable to both those objects; the 7th section renders the inhabitants of the hundred

1823.

The KING *against* D. W. HARVEY and CHAPMAN. *Saturday, November 8th.*

THIS was an information filed by his majesty's Attorney-General against the defendants, for a libel, contained in a newspaper of which the defendant *Harvey* was the proprietor, and the other defendant the printer and publisher. The libel was the leading article in the paper, and headed "Latest Intelligence—The King," and began in the following words: "Attached as we sincerely and lawfully are to every interest connected with the sovereign, or any of his illustrious relatives, it is with the deepest concern we have to state, that the malady under which his majesty labours is of an alarming description. It is from authority we speak." The libel then stated several facts relating to the king's illness, and concluded by alleging that his disorder was of an hereditary description. At the trial before

A libel imputed that his majesty laboured under mental insanity; and it stated that the writer communicated the fact from authority.

Upon the trial of the information, the publication of the libel was proved. It was admitted by the defendants that the statement in the libel was untrue, and they did not offer any evidence to shew that they had any authority for making it; and the Judge in his charge to the jury having

stated that it was a criminal act to assert falsely of his majesty or of any other person that he was insane, and it being admitted by the defendants themselves that the fact stated in the publication was false, in his opinion it was a libel: Held, that this direction was correct in point of law, and that the Judge was warranted in saying that the defendants had admitted the charge contained in the libel to be FALSE; for assuming that there might be a distinction between a mere untruth and a criminal untruth, and that the term "false" applied only to the latter, still as the defendants had stated that they communicated the fact from authority, and had not proved that they had any such authority, they must have been guilty of a criminal untruth or falsehood by stating as a fact, the knowledge of which they had derived from authority, that which was untrue, and for which they had no authority.

The jury having retired for a considerable time, returned into court, and desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the Judge answered, "The man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can shew the contrary; and it is for him to shew the contrary:" Held, that this answer was correct in point of law, and that the Judge was not bound to answer in the affirmative or negative the abstract question put to him; and assuming that a malicious intention is necessary to constitute a libel that intention is to be inferred from the mischievous tendency of the publication itself, unless the defendant shews something to rebut such inference, and therefore that the publication of a libel of mischievous tendency having been proved, and the defendant not having shewn that he published it from authority, the jury were bound to find that he published it with a malicious intention.

1823.

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against
HARRY.

Abbott C. J., at the *London* sittings after last term, the publication of the libel was proved in the usual manner; and it was admitted by the counsel for the defendants, that the libel imported that the king laboured under insanity, and that that assertion was untrue; but it was urged to the jury that the defendants believed the fact to be true, and that they were warranted in so doing by rumours which had been very prevalent on the subject. The Lord Chief Justice, in his address to the jury, after stating the import of the publication, proceeded as follows: "To assert falsely of his majesty, or of any other person, that he labours under the affliction of mental derangement, is a criminal act. It is an offence of a more aggravated nature to make such an assertion concerning his majesty than concerning a subject, by reason of the greater mischief that may thence arise. It is distinctly admitted by the counsel for the defendants, that the statement in the libel was false in fact, although they assert that rumours to the same effect had been previously circulated in other newspapers. Here the writer of this article does not seem to found himself upon existing rumours, but purports to speak from authority; and inasmuch as it is

tion the Lord Chief Justice returned the following answer: "The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can shew the contrary; and it is for him to shew the contrary. There may indeed be innocent publications of that which, in its own nature, is injurious to another, as, for instance, the delivery of a book containing libellous matter to a magistrate; but the general rule is, that a person must be taken to have intended to do that which his act is calculated to effect." The jury again retired for about three hours, and then returned a verdict of guilty; but recommended the defendants to mercy.

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against
HARVEY.

Deuman and *Brougham*, for the different defendants, now moved for a new trial, upon the ground of misdirection; and they made three points: First, that the Lord Chief Justice had stated to the jury, that the defendants' counsel had admitted the statement in the libel to be false in fact, using that word to denote a criminal untruth. Secondly, that the question put by the jury, on their return into court, had not been distinctly answered; and, thirdly, that the observations made by the Lord Chief Justice, by way of answer to that question, were calculated to mislead the jury. As to the first point, the fact imputed by the libel was admitted to be untrue, but not to be false or untrue in the knowledge of the defendants; for it was urged to the jury that the defendants believed the fact, and that they were warranted in so doing from the rumours which had prevailed very generally. The fact of such rumours having existed might be within the knowledge of the

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jury themselves, and might, at all events, be collected from the terms of the publication itself. The mere untrue assertion of a fact is not in all cases criminal. Where a master is called upon to give the character of a servant, the assertion must be malicious as well as untrue to make it criminal. Here the impression conveyed to the minds of the jury was, that the defendants had admitted that they had asserted a fact which they knew to be false. In *Haycraft v. Creasy (a)*, where the plaintiff, a person in trade, made an inquiry concerning the credit of another, and the answer was, that he might safely be credited, and that he (the person giving the information) spoke this from his own knowledge and not from hearsay; it was held that the assertion of knowledge meant no more than a strong belief, grounded upon what appeared to the party to be reasonable and certain grounds. The words used in this case are not stronger than those in the case cited. [*Best J.* There fraud was the gist of the action; and, therefore, it was necessary to shew, not only that the statement was untrue, but that it was made *malò animo*.] Secondly, the abstract question put by the jury was not distinctly answered. They were not told whether a malicious

to constitute a

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licious or not. They may have founded their verdict upon the circumstance of the assertion being untrue, although they may have been of opinion from facts within their own knowledge, and from the import of the publication itself, that the defendants had only repeated that which had been publicly rumoured, believing it to be true at the time when they published it. It was laid down to the jury as a presumption of law, that malice was to be inferred from the mere fact of publication, whereas that is only one of the circumstances from which they may be warranted in drawing a conclusion of fact. The question of malice is in all cases a question of fact, to be collected from the evidence before the jury. [Bayley J. I take the law to be, that where a particular consequence necessarily results from any act, the party doing the act is to be considered as *prima facie* intending the necessary consequence of that act. Thus in *Rex v. Farrington*, M. 1811, the indictment was for setting fire to a mill, with intent to injure the occupiers thereof. The indictment was not preferred until above eighteen months after the offence was committed, so that it could not be supported on the 9 G. 3. c. 29. The prisoner was of weak intellects, but not in such a state as to be entitled to an acquittal for want of reason. A point reserved was, whether, under 43 G. 3. c. 58., it was not necessary to give some evidence of an intent to injure, beyond the mere act of setting fire; but the Judges were unanimous that the prisoner must be taken to have intended that which was the necessary consequence of his act, and the conviction was held right. In *Rex v. Mazagora*, Easter, 1815 (a), the indictment was for dis-

(a) The learned Judge read both these cases from a manuscript. The first of them is to be found in 2 *Russell*, 1675., and the other in *Bayley on Bills of Exchange*, 443.

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against
Hawley.

CASES IN MICHAELMAS TERM

posing of forged bank notes, the intent was charged to be to defraud the bank. The jury found the prisoner guilty, but that the intent was, to defraud any person who might take the notes: and that the intention of defrauding the bank in particular did not enter into the prisoner's contemplation. On case, the Judges thought the matter too clear for discussion, and that the prisoner must be taken to have intended to defraud the bank, and that the conviction was right.] *Eldridge v. Knott* (a), and *Doe dem. Fenwick v. Reed* (b), are authorities to shew that the presumption of title from length of possession is a question of fact for the jury. Besides here, too, it was laid down, that the malicious intention was to be inferred unless the contrary was proved; and that the onus of proving the contrary lay upon the defendant. Now, the jury may have been led to believe that it was necessary for the defendant to produce oral or documentary proof to rebut the presumption of malice; and if they so understood it, they might thereby be induced to convict the defendants, although from facts within their own knowledge, and from the publication itself, they may have been of opinion that the defendants published it bona fide, believing the facts stated to be true.

It appears to me, that this case was pro-
posed to the jury in the
Lord

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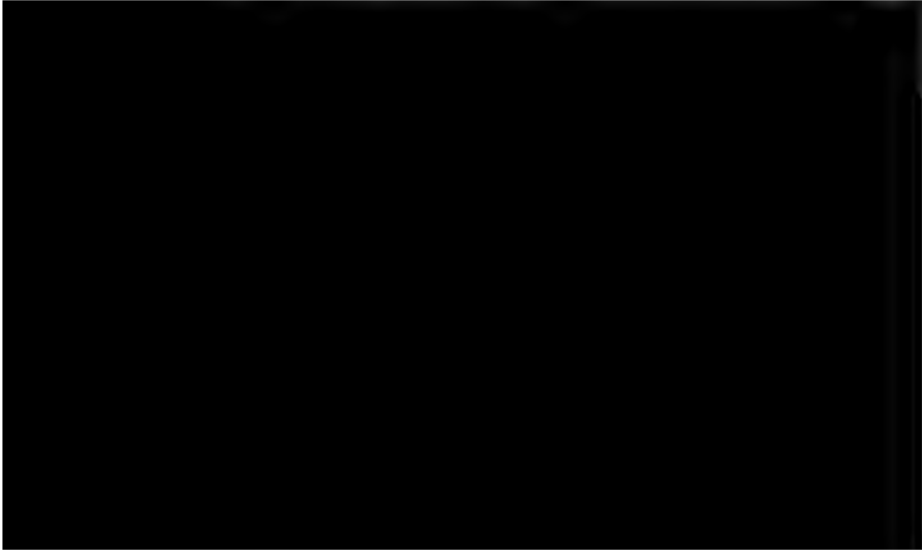
 The King
 against
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and find the defendants guilty. It is impossible to form an accurate judgment of the direction to the jury, without adverting to the terms of the libel itself. It contains not merely an assertion of a fact which a party may suppose to be true, and with respect to which he assumes to have had only ordinary means of knowledge; but it is such an assertion, that if it were a bonâ fide assertion, the means of proving it to be so must be within the writer's own power. He does not merely say that such a fact exists, but he assumes to speak from authority. It is conceded, that to state falsely of his majesty that which is stated in this publication is a libel. If it be not so, the objection will be upon the record, and may be taken advantage of either upon writ of error or by a motion in arrest of judgment. But, as at present advised, I am of opinion that falsely making that assertion was evidence that the party made it maliciously. A distinction has been made between an untrue and a false assertion, and it has been argued, that if a party assert a particular fact, believing that the fact exists when it does not, although that be an untrue assertion, yet there is no criminality in it; but that if he assert that which he knows to be untrue, that is a criminal untruth or a falsehood. Assuming that that is a well-founded distinction, I think that if a party knowing a fact not to be true, or not having the means of knowing whether it be true or not, takes upon himself to assert that it is so, then he makes a false assertion, or is guilty of a criminal untruth, if it turns out that his assertion is unfounded. In the one case the criminality consists in asserting that which he knows not to be true; in the other he is making an assertion unwarrantably, when he does not know whether it be true or not. There are authorities to shew, that

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if a man will take upon himself to swear to a thing when he does not know whether it be true or false, he is liable to be indicted for perjury, if his testimony prove to be false. Now is the assertion in this case to be considered false or not, in the latter sense of the word? A party making such an assertion may or may not have the means of knowing the state of his majesty's health; but here, the writer takes upon himself to state that he has authority for stating such and such facts. Now, if he had such authority, he had the means of proving it to the jury, and of shewing that the character of untruth belonged to it only, and not that of falsehood or criminal untruth; but inasmuch as he has not shewn that he had any authority for stating the fact, it must be taken that he had none, and that it was a false assertion, which disposes of one ground upon which this motion was made. Then the other question arises, whether the defendant is to be considered as having published the libel with a malicious intention. Assuming malice to be necessary in all cases to constitute a libel, I take it to be established by many authorities, to some of which I have referred in the course of the argument, that a party must



to shew that the answer given by my Lord Chief Justice to the question put by the jury was perfectly correct. That was an indictment against the defendant for publishing a libel of one *Kirkpatrick*, an inspector of taxes. The libel purported to be an account of a speech delivered by the defendant in the House of Commons, but it was published by him as a correct report of such speech. It was objected at the trial, that there was not any proof of malice, so as to make the publication libellous. The case was tried before Mr. Justice *Le Blanc*, a man of great talent, accuracy, and firmness; and he was of opinion, that it was not necessary to prove malice, but that it might be inferred from the publication itself, and he told the jury that they were to look both to the matter and the manner of the publication, in order to decide whether it was libellous or not. The defendant having been found guilty, a motion was made for a new trial. The rule was refused, and Lord *Ellenborough* says, "The only question is, whether the occasion of the publication rebuts the inference of malice arising from it;" and *Le Blanc* Justice stated "that he had told the jury to consider whether the publication tended to defame the prosecutor, giving his opinion that it did, but still leaving the question to them; and he further stated to them that where the publication is defamatory the law infers malice, unless any thing can be drawn from the circumstances of the publication to rebut that inference." I cannot distinguish that case from the present. Here, the publication was of a matter which, if false, it is now conceded was libellous. Now this decision says, that malice ought to be inferred from the publication of defamatory matter, unless some excuse for the publication be shewn. The onus, therefore, of negating malice

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malice is properly cast upon the defendant; for where the natural inference from the publication is that it is malicious, the party seeking to exempt himself from such natural inference, must do it by shewing something to rebut the inference, otherwise arising from his act. Here, the defendant might have adduced evidence for that purpose; he might have shewn what his authority was. In the absence of any such evidence, I think the intention was naturally and properly to be drawn from the libel itself; and, consequently, that there is no foundation whatever for disturbing the verdict.

HOLROYD J. I am of the same opinion. This is a charge for a publication of a libellous nature, and of a description not only injurious to the individual to whom it relates, but mischievous to the public, inasmuch as it was calculated to excite great alarm in the minds of the people, as to the state of his majesty's health: Now, if a thing in itself mischievous to the public be wrongfully done, that is an indictable offence. It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable. In some cases, as in that of murder, malice is the very gist of

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ation in this case assumes the knowledge of the fact which it alleges. It states that the writer had it from authority, and whatever may be the import of that word, if there was any authority to justify or excuse the publication, it ought to have been shewn by the defendant. For if the matter published was in itself mischievous to the public, the very act of publishing is *prima facie* evidence to shew that it was done *malò animo*; for when a publication having such an injurious tendency is proved, it is intended to have been done with a malicious intention; because the principle of law is, that a party must always be taken to intend those things and those effects which naturally grow out of the act done. If, therefore, the effects naturally flowing from the act of publishing the libellous matter in this case were mischievous to the public, it follows, that the Judge was bound to tell the jury that malice was, by law, to be inferred; and that that having been proved, which, according to the principles of law, made the inference of malice necessary, the onus of rebutting that inference was cast upon the defendant. It is said, however, that my Lord Chief Justice was bound to answer the abstract question put by the jury, but I am of opinion that a judge is not bound to answer any question, except so far as it is material to the matter which the jury have to decide; and in this case if the jury were satisfied from the answer given, that it was to be presumed that the defendant intended the consequences which would naturally follow from his act, they must at the same time have been satisfied there was sufficient proof of malice, and therefore there can be no ground for disturbing the verdict

BEST

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against
HARVEY.

BEST J. The paper set forth in this information is most correctly called by it a false, scandalous, and malicious libel. We have been told by the defendant's counsel, that malice is the gist of this prosecution. I accede to this, but we must settle what is meant by the term malice. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred or ill-will to an individual; but means any wicked or mischievous intention of the mind. Thus, in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary, in support of such an indictment, to shew that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable or excusable cause. Malice, in the law relative to libels, means legal malice. The only question which the jury had to decide was, whether a paper which falsely represented that the sovereign of the country was insane and, so, incapable of discharging the duties of his office, was a mischievous paper: no men, whose



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against
HARVEY.

of his majesty's mind, made with a view to disturb the peace of the country. It was admitted at the trial that the libel was false, but it was at the same time insisted, that the defendants, at the time when they published it, did not know that it was false. They say they publish from authority, and thereby undertake to be responsible for its truth. But whether a publication be true or false is not the subject of inquiry in the trial of an information for a libel; but whether it be a mischievous or innocent paper. In the position in which this case now stands it is not necessary to decide whether the defendants would have been justified had the statement been true. But it must not be taken for granted that if such a dreadful affliction had happened to the country, as the insanity of the king, the editor of a newspaper would be justified in publishing an account of it at any time, and in any manner that he thought proper. It is fit the time and mode of such a communication should be determined on by those who are best able to provide against the effects of the agitation of public feeling which it is likely to produce. A reasonable time should be left to the constituted authorities to give the nation such afflicting intelligence. During that time decency requires that all other persons should be silent. If such a communication should be improperly delayed, the fair liberty of the press would allow any person to call the attention of the nation to the circumstance. But such a communication, rashly made, although true, might raise an inference of mischievous intention, for truth may be published maliciously.

ABBOTT C. J. My learned brothers having delivered their opinion, that nothing which fell from me, in my
address

1833.

The King
against
HASTY.

address to the jury, furnishes sufficient ground for granting a new trial, it is perhaps unnecessary for me to say any thing; I cannot, however, forbear making one or two observations. If it be true that a malicious intention be necessary to render amenable to the law a person who publishes defamatory matter, — I say that unless that malicious intent may be inferred from the publication of the slander itself, in a case where no evidence is given to rebut that inference, the reputation of all his majesty's subjects, high and low, would be left without that protection which the law ought to extend to them. I will say further, with regard to the particular expression contained in this publication, that if any writer thinks proper to say, that he speaks from authority, when he informs his readers of a particular fact, and it shall turn out that the fact so asserted is untrue, I am of opinion, that he who makes the assertion in such a form, may be justly said to make a false assertion. I am not a sufficient casuist to say, that to call it an untrue assertion would be a more proper mode of expression.

Rule refused.

1823.

**ASTLE and Another against THOMAS and
BALDWIN.**

*Monday,
November 10th.*

ASSUMPSIT by the plaintiffs, churchwardens of the township of *Burton-upon-Trent*, in the parish of *Burton-upon-Trent*, against the defendants, late churchwardens of the same township, for money had and received, to the use of the plaintiffs, as churchwardens as aforesaid. Plea, by *Thomas*; the general issue, by *Baldwin*, that two other persons, *J. T.* and *J. H.* should have been sued together with him and *Thomas*. Issue thereon. At the trial before *Park J.* at the last assizes for the county of *Stafford*, it appeared that the parish of *Burton-upon-Trent* consists of the township of *Burton-upon-Trent*, for which two churchwardens have always been appointed; and also of several country hamlets, which have jointly appointed two other churchwardens. There is only one parish-church in the parish, and that is situate in the township of *B.* Separate rates have always been made by the two sets of churchwardens. When the defendants went out of office the sum of 18*l.* remained in their hands. *J. T.* and *J. H.* were churchwardens for the country hamlets, when the defendants were churchwardens for the township of *Burton*. For the defendants it was objected, that the whole body of churchwardens appointed for the parish formed but one corporate body, and that the action should have been brought by all the present against all the late churchwardens. The learned Judge overruled the objection, and the plaintiffs had a verdict for 18*l.*

In the parish of *A.*, two churchwardens were elected for the township of *B.*, and two others for the rest of the parish. Separate rates were made for these divisions: Held, that the churchwardens elected for the township of *B.* might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants.

Campbell

1823.

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APPEAL
AGAINST
THOMAS.

Campbell now moved for a new trial, and relied on the objection before mentioned. It is true, that in this parish no common fund was raised. The churchwardens appointed by the township of *Burton*, and those for the country hamlets made separate rates for their divisions respectively. But *Rex v. Gordon* (a) shews that there must be one rate for the whole parish, and that separate rates, by separate bodies of churchwardens, cannot legally be made. [*Bayley J.* The rate there in question was a poor-rate, between which and the present there is this material distinction : there may be an immemorial custom as to a church-rate, but not as to poor-rates, which had no existence before the reign of *Eliz.*] At all events the appointment of churchwardens cannot be for a township, it must be for a parish ; if, therefore, the plaintiffs were sworn in, and acted for the township of *Burton-upon-Trent*, they were not legal officers, and if they were appointed for the whole parish, the whole body of churchwardens should have joined in the action, therefore, quacunq̃ue viâ, the defendants are entitled to a new trial.

ABBOTT C. J. I think we are not called upon to en-



was raised. I am, therefore, of opinion, that the plaintiffs being invested with a right to the management of that sum, are entitled to maintain an action for it.

Rule refused.

1823.

ASTLE
against
THOMAS.

COLLEY and Another *against* STREETON and Others.

Thursday,
Nov. 13th.

ASSUMPSIT on a special agreement. The declaration stated, that by a certain memorandum of agreement, sealed with the seals of the defendants, made July 25th, 1816, between plaintiffs of the one part, and defendants, described as assignees of one *S. Crane*, a bankrupt, of the other part; reciting, that by an agreement, under the hand of *J. Peacock* of the one part, and *S. Crane* of the other part, bearing date March 29th, 1796, *J. Peacock* agreed to let unto *S. Crane*, and *S. Crane* agreed to take and rent of *J. Peacock*, certain premises therein mentioned, for thirty-four years, at the yearly rent of 40*l.*; and that *S. Crane* thereby agreed to keep the same in good and tenantable repair, during the said term, and that *Peacock* thereby agreed to grant a lease on those terms to *Crane*, with usual covenants, within three calendar months, and that *Crane* agreed to execute a counterpart thereof; reciting also, that *Peacock* procured a lease to be granted to him

Where a tenant occupied, under an agreement containing a variety of provisions, and among-t others, that he should keep the premises in tenantable repair :

Held, that the landlord might declare generally, " that the defendant became tenant, and in consideration thereof undertook to repair," without setting out the agreement.


Where *A.* held premises under a lease containing a clause of re-entry for want of repairs, and afterwards underlet a part to *B.*, who undertook to repair within

three months after notice for that purpose; the premises underlet being out of repair, *A.*'s landlord threatened to insist upon the forfeiture if they were not repaired, and *A.* gave notice to *B.* to repair. The premises at the expiration of three months from that time remaining out of repair, *A.* entered and repaired: Held, that he might recover from *B.* the sum expended on that occasion. After the repairs were done by *A.*, but before the commencement of the action, *B.* sold his interest in the premises to a person who pulled down and entirely rebuilt them: Held, that this did not deprive *A.* of his right to recover the whole sum expended by him.

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COLLY
against
STANSTON.

of the said premises, together with others, by one indenture, dated the 21st *January*, 1802, for a longer term than that by him agreed to be granted as aforesaid; reciting also, that *Peacock* afterwards granted an under-lease of all the said premises, for nearly the whole of his term therein, unto *J. S.* and *J. J.*, subject to the said agreement with *S. Crane*, and that the same under-lease was then effectually vested in the plaintiffs; reciting also, that defendants, as assignees as aforesaid, were entitled to the benefit of the said agreement entered into with *Crane*: the said plaintiffs did agree with the defendants, that they would, on or before the 9th of *September* then next, demise and leave unto defendants all the premises, by the said agreement of the 29th of *March*, 1796, agreed to be demised, for the residue which should then be to come of the said term of thirty-four years; and the defendants did thereby agree that they would accept such lease, and execute a counterpart: and it was mutually agreed, that in the said lease there should be a covenant, that the leasees should pay the rent, and keep and preserve the premises in sufficient and tenable repair; and that it should be lawful for the plaintiffs to enter and view the



things as it was agreed that there should be covenants for the lessees to do and perform. Averment, that plaintiffs did, before any lease was made, viz. from the day and year first mentioned, until the commencement of the action, suffer the defendants to occupy as aforesaid, yet the defendants, during all that time, suffered the premises to be out of repair; that plaintiffs entered and viewed the premises, and on 17th of *October*, in the year first aforesaid, gave the defendants notice of the want of repair, but that they did not repair within three calendar months, by reason whereof plaintiffs were obliged to lay out a large sum of money in repairing the premises. Second count, that on, &c. in consideration that defendants, at their request, had, before that time, become, and then were, tenants to plaintiffs of certain premises, they undertook to keep the same in good and tenantable repair; that they did not do so, whereby plaintiffs were obliged to lay out a large sum of money in repairs. Third count, same in substance; and common money counts. Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings before this term, the plaintiffs gave in evidence the agreement set out in the first count of the declaration. Whereupon it was objected for the defendants, that the instrument therein recited, bearing date *March*, 1796, was a lease to *Crane*, and that there being a subsisting lease at the time when the new agreement was made with the defendants, the consideration for the promise laid in the first count was incorrectly stated; the action should have been founded on the original lease. The Lord Chief Justice observed, that it was immaterial whether the instrument were or were not a lease, as the second and third counts stated that defendants had become tenants to the plaintiffs.

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 COLLEY
 against
 BRANKTON.

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—
Coley
against
Benson.

The plaintiffs then proved a lease to *Peacock*, with a covenant by him to repair, and a clause of re-entry for any breach of covenant, and an under-lease, with like covenants granted by him, which afterwards became vested in the plaintiffs; they then proved that their superior landlord, on the 28th of *September*, 1816, gave them notice to repair the premises in question, which were out of repair; and that on the 17th of *October* following, they served on defendants' solicitor notice to repair. The defendants said they were about to sell the premises, and begged that they might not be then compelled to repair. No repairs were done by them, nor were the premises sold. Plaintiffs frequently, afterwards, applied to them to repair, and said that if it was not done they would send workmen to do it; and on the 19th of *March*, 1817, the plaintiffs sent workmen, who repaired the premises at an expense of 228*l.*, doing no more than was necessary to put them in tenantable repair. No express assent by the defendants was proved; but some evidence was given to shew that they knew what was going on, and did not dissent until after the sum above mentioned had been expended. The defendants afterwards sold the premises to a purchaser, who pulled

Wilde now moved for a new trial, on the ground of a variance between the declaration and the evidence, and on the ground of a misdirection by the Lord Chief Justice as to the quantum of damages. This was an action founded on an implied contract to repair the premises which the defendants occupied; the first count set out an agreement to grant a lease, and alleged that the defendants agreed to occupy according to the terms of that agreement until the lease should be executed. The second and third counts stated that a tenancy existed. Now, if the instrument of 1796 between those under whom the plaintiffs claim and the defendants was a lease, it was still subsisting when the new agreement was entered into in 1816, and consequently the parties occupied under the first, and not under the second agreement; so that the consideration laid for the promise in the first count fails. The principle upon which to decide whether any instrument be or be not a lease, is clearly laid down in *Bac. Abr. Lease* (K). "Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time; such words, whether they run in the form of licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years." [*Abbott* C. J. Supposing it to be a lease, and that the first count was not proved, what objection is there to the second and third?] They are both framed on an implied promise, arising out of the tenancy; whereas the promise was express, and contained in an instrument containing a variety of provisions, the whole of which, taken together, formed the consideration of the promise; the whole, therefore, should have been set out in those counts. [*Abbott* C. J. The instrument which you men-

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 COLLEY
 against
 STAKETON.

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*Gossar
against
Bridgman.*

tion was not under seal; it was merely evidence of a continuing promise by the person coming into possession, to perform the contract with the person who might happen to be the owner of the premises. — *Holroyd J.* If the defendants were occupying under the terms of the original agreement, they were bound to perform the terms of it; nor was it necessary to set out the whole of it. The obligation to repair arises out of the tenancy: the agreement shewing a tenancy was evidence to prove the promise as laid; for, by law, the defendants as tenants were bound to keep the premises in repair.] Then, secondly, the question of damages was not correctly left to the jury. The premises were actually rebuilt before the action was commenced; under such circumstances, the plaintiffs could not have claimed more than nominal damages if they had not laid out their money in the repairs. But as there was not any evidence to shew that the repairs were done with the assent of the defendants, (and without such assent the plaintiffs had no right to enter for the purpose of doing them,) they ought not to be prejudiced by that circumstance. Suppose, instead of repairing the premises themselves, the plaintiffs had brought an action against the defendants for suffering them to be out of repair, and at that time had been proved that before the action was brought the premises had been repaired, surely nomi-

In *October*, 1816, notice to repair was given to the defendants, but they did not repair. The premises were at that time unoccupied; the defendants had put them up to sale by auction and bought them in, but were about to make another attempt to dispose of them. Application was then made to the attorney for the defendants, who said that they wished the landlord to suffer the premises to remain unrepaired until after the sale. The plaintiffs then gave notice, that if the necessary repairs were not done by a certain day, they would order them to be done. Under these circumstances the plaintiffs did repair at a certain expence, which, at the trial, was proved to be a fair and reasonable sum to be expended in such repairs. I told the jury that it was quite immaterial whether the action was founded on the instrument executed in 1796, or on that of 1816, because in each there was a stipulation to repair; and further, that it was not necessary for the plaintiffs to prove that the defendants assented to the repairs being done by them, because if there was no such assent, the plaintiffs would be trespassers, and liable to an action for the entry. I observed to them, that the plaintiffs were under an obligation to repair in order to preserve their own estate; and further, that as landlords, they had a right to have the estate at all times in good repair, for otherwise their reversion would be lessened in value; and I left it to them to decide whether the sum expended was or was not reasonable. They found that it was, and I cannot say that I am by any means dissatisfied with that finding.

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 COLLEY
 against
 STUBBINS,

BAYLEY J. I think that this case is free from all doubt; the defendants held the premises under an obligation to repair, which they did not perform. The

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STANSTON.

measure of the damages was properly the loss which the plaintiffs sustained, by reason of the default of the defendants. That was the sum reasonably expended by them in doing such repairs as were necessary for the purpose of avoiding a forfeiture of the lease, which they had of these, together with other premises.

HOLROYD J. I am of opinion that there is not any ground for a new trial in this case. The plaintiffs are entitled to retain the verdict for the damages given. It is clear that they sustained a loss to that amount, in repairing the premises which the defendants ought to have repaired. Assuming that the landlords lawfully entered and repaired, this is quite clear, for the subsequent rebuilding was no remuneration to them. It is argued, however, that the plaintiffs had not any right to enter; but I think that they had, on the ground that they were liable to repair, and that the want of repair by the defendants was a forfeiture for which they might enter, under the provision in the agreement, that there should be a clause of re-entry for breach of any covenant in the lease contracted for, although they may be considered as having subsequently waived the forfeiture. But what-

1823.

WARREN *against* HOWE.Thursday,
Nov. 13th.

COVENANT on an indenture: Plea, non est factum. An assignment by indenture of a judgment debt is not an assignment of property within the meaning of the 55 G. 3. c. 184., Sch. part. I., tit. *Conveyance*, and does not therefore require an ad valorem stamp; but must have the ordinary deed-stamp.

At the trial before *Abbott C. J.*, at the *London* sittings after last term, the deed was produced in evidence; and it recited, that the defendant being indebted to the plaintiff in the sum of 50*l.* 5*s.*, and being unable to pay, had requested the plaintiff to take an assignment of a judgment against one *Morgan* for 168*l.*, in order to secure to the plaintiff the payment of his debt; and that he assigned the judgment to the plaintiff, to secure him the payment of 50*l.* 5*s.* upon trust in the first place, out of the monies to be recovered on such judgment, to pay the expences of the assignment, and all necessary expences in enforcing payment of the judgment not exceeding 30*l.*; and in the next place to pay himself the 50*l.* 5*s.*, and then to pay the residue to the defendant. The deed had an ad valorem stamp of 1*l.* 10*s.* It was objected that it ought to have had the common deed stamp of 1*l.* 15*s.*; and the Lord Chief Justice being of this opinion, nonsuited the plaintiff, but reserved to him liberty to enter a verdict for 50*l.* 5*s.* if the Court should be of opinion that the deed was duly stamped.

Jeremy now moved accordingly. The deed was properly stamped. By the 55 G. 3. c. 184. sched. part I., tit. *Conveyance*, a stamp of 1*l.* 10*s.* is required upon the sale of a right title, interest, or claim, into, out of, or upon any lands, tenements, rents, annuities, or other property where the consideration-money amounts to 50*l.*, and
does

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does not exceed 150*l*. Now, the assignment of a judgment-debt is an assignment of a right to property within the meaning of that clause. It is clear that a *chase* in action may be assigned for a just debt (*a*), and that a debt upon a judgment may be assigned (*b*); and, although in such cases, actions must be brought in the name of the assignor, still the assignee has a property in the right assigned; and that was so considered by *Bul-
ler J.* in *Master v. Miller*. (*c*) It is true, that the Court of Common Pleas in *Coats v. Perry* (*d*) were of opinion, that a deed of assignment of property to trustees in trust to sell, was not a conveyance within the meaning of this clause, on the ground that it applied only to actual sales between vendor and vendee; but here there was an actual transfer of the assignor's right to the amount of the debt to the assignee. Secondly, if it does not fall within this clause it is a conveyance of property in trust for sale, intended only as a security for money; and for the duty imposed upon such a deed, the schedule refers to title *Mortgage*, and by that the duty of 1*l*. 10*s*. is required in cases where the same is intended as a security for the payment of a sum exceeding 50*l*., and not exceeding 100*l*. In the deed in question, it was

most cases the former duty is higher. Whether this clause of the statute requiring the ad valorem duty be cumulative or not, it is unnecessary to decide in this case, for we are all of opinion that a judgment-debt is not property within the meaning of the clause. The words are, "conveyance of any right, title, interest, or claim to any lands, tenements, rents, annuities, or *other property*, for or in respect of the deed, whereby the lands or other things sold shall be conveyed to the purchaser. The statute enumerates things which are the subject of sale, and which are usually converted into money; and I think that the expression, other property, applies only to property of the same description as that previously mentioned, viz. such property as is usually the subject of sale and may be converted into money. Now, a judgment-debt is not a property of that description. It clearly does not fall within the other clause which has been adverted to, because it is not a conveyance of property in trust for sale.

1823.

 WARREN
against
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Rule refused.

BLIZARD *against* KELLY.Thursday,
Nov. 13th.

ACTION for slander. One count charged that the defendant had wrongfully, and without reasonable or probable cause, imposed the crime of felony upon the plaintiff. Plea, not guilty. At the trial before Park J., at the last assizes for the county of Gloucester, the plaintiff obtained a general verdict with 200*l.* damages. Taunton now moved to arrest the judgment, on the ground that the count which stated that the

A count in slander, charging that defendant had imposed upon the plaintiff the crime of felony, is good after verdict. (a)

(a) See Comyns' Dig. tit. *Action on the case for Defamation*, D. 4. and 1 Ventris, 264.

defendant

1833.

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 BURNARD
 against
 KILBY.

defendant had imposed upon the plaintiff the crime of felony, was bad. Those words had no specific meaning. If the plaintiff recovered damages upon that count, he might afterwards bring an action for the specific words used, and the judgment obtained in this action could not be pleaded in bar. *Cook v. Cox* (a) is an authority to shew that the words themselves ought to be set out in the declaration, and that a count containing such a general charge is bad, even after verdict. In *Pippett v. Hearn* (b), although it was held that a count charging generally, that the defendant had maliciously indicted the plaintiff for wilful and corrupt perjury was good after verdict, yet a distinction was there taken between felony, which embraced a variety of charges, and perjury, which was one distinct crime.

R. Bayly, amicus curiæ, stated, that he had for many years in his precedent-book a form of such a count, and a manuscript note of a case taken by the late Lord Chief Justice *Gibbs*, in which such a count was held good after verdict; and *Starkie*, amicus curiæ, referred the court to *Davis v. Noakes*. (c)

ABBOTT C. J. This form of count is very ancient. The present use are a bad translation of the original. The legal

The objection taken to such a count, that it does not specify the particular felony with which the party was charged is not valid after verdict.

1928.

BLIZARD
against
KELLY.

Rule refused. (a)

(a) The following case is taken from Lord Chief Justice Gibbs's MS. Note Book.

Coleman v. Goodwin, B. R., Easter, 1782. — Case for slander. The declaration consisted of nine counts. The first stated that before, &c., one *J. H.* lived at *Bristol*; that said *J. H.* before, &c., and whilst he lived at *Bristol*, had been, and was suspected, and publicly accused and charged with having been guilty of sodomitical practices. That defendant, in a discourse concerning plaintiff, and concerning said *J. H.*, and concerning sodomy and sodomitical practices, spoke, &c. The six next counts charged different sets of words. The eighth repeated the same colloquium; and the words laid were, "I have known him to stay all night at *H.*'s;" meaning, &c. to insinuate that plaintiff had been concerned in, and had been guilty of sodomitical practices with said *H.* The ninth charged that defendant had imposed the crime of having been guilty of sodomitical practices on the plaintiff.

Verdict for plaintiff, damages 500*l.* The verdict was general.

Wallace and Bearcroft contended, in arrest of judgment, that the last two counts were bad. They objected to the eighth, that the words were clear in their meaning, and innocent, and that an inuendo may fix the doubtful or ambiguous meaning of words, but cannot annex a sense totally collateral; 4 *Co.* 17.: and to the ninth they objected, that sodomitical practices was no specific charge; *Sayer's case, M. T. 18 G. 3.*, where the court said they knew what treason was, but not what treasonable practices meant. (a)

Solicitor-General (Lee), Wilson, and Pigott, contra, said the old doctrine of words was now exploded, and it was fully settled that their meaning was a fact to be left to the jury.

LORD MANSFIELD. It is much to be lamented that, upon a general verdict, the court cannot give judgment if any one count is bad.

It is objected that the last count contains no description of any crime known in law. That is not necessary. It charges it in the vulgar language, which is sufficient.

Next, it is said that the words in the eighth count are not sufficient, &c. What do these words signify? Can any one doubt? The meaning of all words depends on the subject matter. It is for the determination of the jury, and was left to them.

(a) Reported 2 *W. Bl.* 1165., but the dictum here cited is not in the printed report.

ASHHURST

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BLISSARD
against
KELLY.

ASHMURST J. The effect of the words on the hearer is what is to be considered. The old cases are a disgrace to the law.

BULLER J. How this would rest upon the bare innuendo, might be doubtful; but with the colloquium there can be no doubt. The question is, whether these words, by any construction, can mean to impute sodomy. They certainly can, and it is found they do. The reason for arresting judgments upon general verdicts in civil cases is because the court cannot tell how to apportion the damages. In indictments it is different, because it appears that the defendant has been guilty of a crime for which he is to suffer.

As to the last count, words will not support such a count. It is understood to mean an accusation before a magistrate; but in such an accusation it is not necessary to use the words of a legal charge; that is made out afterwards by the evidence.

Rule discharged.

Thursday,
Nov. 13th.

The KING against The Justices of the North Riding of YORKSHIRE.

Prisoners committed to gaol for trial, who are able, but refuse to work, are not entitled by law to have any food provided for them by the public; and therefore

M. STAPYLTON, Esquire, a magistrate for the North Riding of *Yorkshire*, in his official capacity, visited the house of correction at *Northallerton*, on the 14th *October*, 1823, and found that several prisoners committed for trial had been compelled to work upon the tread-mill, against their inclinations. On the same



cases of such prisoners as might be sentenced thereto, and for the employment of other prisoners; and also, that persons committed for trial, who were able to work, and had the means of employment offered them, by which they might earn their support, but who should obstinately refuse to work, should be allowed bread and water only. Upon an affidavit disclosing these facts, and the belief of Mr. *Stapylton* that bread and water, unaccompanied by any other article of food, does not afford sufficient nourishment for the due support of human nature, and that upon such a diet the health of prisoners cannot be preserved,

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Scarlett (and *Alexander* was with him) moved for a mandamus to the justices of the peace for the North Riding of *Yorkshire*, commanding them to enquire into and rectify this abuse. By stat. 4 G. 4. c. 64. s. 17., "any justice is empowered to enter into and examine the state of any gaol, as often as he shall think fit, and is required to report, in writing, any abuse therein, to the next quarter sessions; which abuse, so reported, shall be taken into immediate consideration, by the justices at such sessions, and the most effectual measures adopted for enquiring into and rectifying such abuse, as soon as the nature of the case will allow." Now, if this Court see that the justices have not complied with the directions of that section, in rectifying the abuse presented, it will, by mandamus, compel them so to do. By section 10., certain regulations are prescribed for the management of prisons; and by the thirteenth regulation it is provided, that "every prisoner maintained at the expence of any county, &c., shall be allowed a sufficient quantity of plain and wholesome food, to be regulated

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regulated by the sessions; regard being had (so far as may relate to convicted prisoners) to the nature of the labour required from, or performed by such prisoners, so that the allowance of food may be duly apportioned thereto: and the justices may order for such prisoners of every description as are not able to work, or being able, cannot procure employment sufficient to sustain themselves by their industry, or who may not be otherwise provided for, such allowance of food as the justices shall think necessary for the support of health." Then section 37., reciting that "persons are often committed to prison for trial who are willing to be employed in such work as can be conveniently executed in the prison to which they are so committed, and it is fit that such persons should be so employed rather than that they should be obliged to remain idle during their confinement," enacts, that any visiting justice may authorize, by an order in writing, the employment of any such prisoners, with their own consent, in any such work; and that the keeper of such prison is to employ such prisoners in such work or labour accordingly, and is to pay to such prisoners any such wages, or portion of the same, and at such periods as shall be directed by such

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to compel the untried prisoners to work against their will; for if they do not work at the employment prescribed, they will have no other allowance than bread and water. That, too, cannot be considered "plain and wholesome food," within the meaning of the tenth section. Such food must, necessarily be of a description adequate to the due preservation of health; yet that is negatived by the affidavit. It is true, that no individual case is mentioned in which the allowance of bread and water alone has had a prejudicial effect upon the health of the prisoner, but it is notorious, that many of the diseases afflicting the labouring classes, result from too spare a diet. [Abbott C. J. How are we to judge what is "plain and wholesome food?" That is matter upon which the justices are exclusively to decide. Can you refer us to any act of parliament which makes it compulsory on the county to provide with food persons committed for trial?] The only statutes bearing upon that point are 19 *Car.* 2. c. 4., 31 *G.* 3. c. 46. s. 13., and 4 *G.* 4. c. 64.

ABBOTT C. J. It appears by the preamble of the 19 *Car.* 2. c. 4. that before that statute there was not any sufficient provision made for the relief and setting on work of poor persons committed to gaol for felony and other misdemeanors, and that they actually many times perished before their trial, and that the poor, living there idle and unemployed, became debauched, and came forth instructed in the practices of thievery and lewdness; and that statute then enabled the justices at sessions to provide a stock of materials, out of the county rate, for setting on work poor prisoners, and to bestow the profits arising from such labour towards their relief.

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The statute 31 G. 3. c. 46. s. 12. extends the provisions of the former statute to all prisoners whatever within the gaols, who may be inclined and willing to work; and by the recital in the thirteenth section, it appears, that even at that time the health of the prisoners was frequently so affected by want of necessary food as to render them incapable of labour when released; and the justices at sessions are thereby authorized to order money to be paid out of the county rate towards assisting prisoners of every description who are not able to work, or who, being able, cannot obtain employment sufficient to sustain themselves by their industry. It is clear, therefore, that before the late statute prisoners who were able and unwilling to work were not entitled to be maintained at the public expence; and it is not contended that that statute casts such a burthen upon the public. There being, therefore, no provision in any act of parliament to compel the county to provide food for those who are able but unwilling to work, we cannot grant a mandamus to compel the justices to order any species of food to be provided for such prisoners. We ought to see clearly that the magistrates have neglected some duty imposed upon them by law before we compel them to

unwilling to work, and if that be so the justices have already done more than the law required them to do, by ordering such persons bread and water.

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against
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BEST J. (a) ' I think that a writ of mandamus ought not to issue in this case, because the magistrates have already done more than we could order them to do. If the law requires a certain thing to be done, we may order it to be done by the party upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, we may compel him to put himself in motion to do the thing, but we cannot control his discretion. By the statute 4 G. 4. c. 64. s. 17. the justices at sessions are bound, upon its being reported by a magistrate that certain abuses exist in a gaol, to take that report into consideration. In this case a magistrate made his report that prisoners committed for trial were compelled to work on the tread mill. The justices at sessions took that report into consideration, and determined that the tread-mill should be applicable both as hard labour to such prisoners as were sentenced thereto, and for the employment of all other prisoners. So far they have complied with the act of parliament, by taking the matter into consideration; but it is said that they have not rectified that which is alleged to be an abuse, because they have directed the tread-mill to be used for the employment of all prisoners, and have also ordered that persons committed for trial, who are able to work, and have the means of employment offered them by the magistrates, by which they may earn their support, but who obstinately refuse to work, shall be allowed bread

(a) Holroyd J. was in the Bail Court.

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against
The Justices of
the N. Riding
of Yorkshire.

and water only; and it is insisted that that is not plain and wholesome food for their support, and therefore a violation of the thirteenth regulation. It is not, however, for us to decide whether it be or be not sufficient, the quality and quantity of the food being left to the discretion of the magistrates. But what right has a prisoner to whom work is offered, and who is able to do it, but will not, to have any food at the expence of the county. According to the poor laws, he who is able to labour is to be maintained by labour only, and nothing is to be provided for him but a means of employment. Neither humanity nor policy requires that one on whom a charge of felony has been made on oath, should be in a better situation than one who lives unsuspected of crime. The common law made no provision for maintaining prisoners in idleness. And the preamble of the 19 Car. 2. c. 4. is a legislative declaration of the mischievous consequences resulting from poor prisoners not having the means of supporting themselves by labour, and from their living in idleness, and that statute, as a remedy for this error, enacts that the justices shall provide materials for setting on such prisoners to work. The wise principle of that, as well as all other statutes

consent of such prisoners. This section prevents them from forcing such prisoners to work against their will, but it does not oblige them to find food for such as are able and will not work. An idle person has no right to the maintenance now claimed for him, and therefore we cannot order the magistrates of the county to provide better food for such prisoners than they have already offered them. I do not mean to say that magistrates in all cases would be justified in offering to such prisoners the same severe labour that persons condemned to hard labour are bound to perform. Inasmuch as the object of employment of prisoners committed for trial is support and not punishment, it may perhaps be fit to provide the most profitable and least irksome labour which, consistently with the security of the prisoners and the situation of the gaol, can be provided.

1823.

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The King
against
The Justices of
the N. Riding
of YORKSHIRE.

Rule refused.

DRAYTON and Another *against* DALE.

Friday,
November 14th.

ASSUMPSIT by the plaintiffs, as indorsees against the defendant, as the maker of a promissory note, dated the 22d of *September*, 1818, for 50*l.*, for value re-

Assumpsit by
the indorsee
against the
maker of a pro-
missory note,
payable to *A. B.*

or his order. Plea, first, non assumpsit; and, secondly, that *A. B.* became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to indorse the promissory note before the time of indorsement became vested in the assignees, whereby the indorsement by *A. B.* was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the indorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant, who had made the note payable to *A. B.* or his order, was estopped from saying that *A. B.* was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons.

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ceived,

1823.

DAVYON
vs
Bart

ceived, payable twenty-four months after date, to one *Gauntlett Clarke, or his order*, and by the said *G. Clarke* indorsed to Messrs. *Knight and Freeman*, and by them indorsed to the plaintiffs. Plea, first, general issue, and secondly, the bankruptcy of the said *G. Clarke* and one *G. Whitehead* the younger, by virtue of a commission of bankrupt dated and issued the 19th November, 1814, and an assignment thereupon by the commissioners to Messrs. *Gibson, Wilson, and Howell*, dated the 1st December, 1814, by reason of which and by force of the statute in such case, &c. the interest, title, and right to indorse the said promissory note in the declaration mentioned, before and at the time of the indorsement by *G. Clarke*, became and was vested in the said assignees, and not in the said *Clarke*, and thereby the indorsement of *Clarke* became void, and created no right in the plaintiffs to sue. The plaintiffs joined issue on the first plea and replied to the second, that after the assignment to the assignees, the indorsement of *Clarke* was made by him by and with the consent of the said assignees. Rejoinder denying such consent, whereupon issue was joined. At the trial, before *Abbott C.J.*, at the adjourned sittings at *Grainthall*, after *Hilary* term, 1821, a

ant for the recovery of the debt, *Clarke* proposed to take that debt upon his own account, and *Wilson* assented to that proposal. *Clarke* informed the defendant of this arrangement, and he gave the promissory note in question in part payment of his debt; *Clarke* indorsed it for a bonâ fide debt to *Knight* and *Freeman*, and the latter indorsed it for a valuable consideration to the plaintiffs. Neither *Knight* and *Freeman* nor the plaintiffs knew of the circumstances under which the note was given. Upon counsel being heard in a former term, the Court were of opinion that there was not any evidence that the note was indorsed by *Clarke* with the consent of all the assignees, and they ordered the verdict to be entered for the plaintiffs on the first issue, and for the defendant on the second issue, and that the case should be submitted for argument upon the following question, whether or not the plaintiffs were entitled to the judgment of the court upon the whole record so framed, notwithstanding the verdict found for the defendant on the special plea.

1823.

 DRAITON
 against
 DALL.

F. Pollock, for the plaintiffs. The question raised upon the pleadings is, whether the previous assent of the assignees is necessary, in order to enable a bankrupt to pass the property in a bill or note by indorsement. It is not alleged that the assignees claimed the property, but merely that the bankrupt had no title. It is clear, however, from a series of authorities, that an uncertificated bankrupt has an interest in property acquired after his bankruptcy, unless his assignees claim it. *Ashley v. Kell* (a), *Chippendale v. Tomlinson* (b), *Webb*

(a) 2 Str. 1207.

(b) Cooke's B. Laws. 406. 7th ed.

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against
DALE.

v. Fox (a), Fowler v. Down (b), and Coles v. Barrow. (c)
Besides, in this case the note was payable to the bankrupt, or his order. The defendant, by giving such a note, held out to the world that the bankrupt was capable of making an order upon the note, and, therefore, is estopped now from saying that he was not competent so to do.

Chitty, contra. The property in the note absolutely vested in the assignees, and they took that property, not as individuals, but as trustees for the creditors; and in that character they were bound to take to the property. *Nias v. Adamson (d)* is a strong authority to shew that the property actually vests in the assignees by the assignment; and *Kitchen v. Bartsch (e)* shews that it is immaterial whether the property came to the bankrupt before or after his bankruptcy. In that case it was argued, but without success, that the defendant, by having contracted with the bankrupt was estopped from saying that he had no title. It is true that there the assignees interfered; but *Nias v. Adamson* shews that that makes no difference. And it is clear that a bankrupt, after an act of bankruptcy, cannot pass the property in a bill by

the Court. The action is brought upon a promissory note, payable to *Clarke* or order, and indorsed by him to a third person, and by him to the plaintiffs. The defendant pleaded, first, non-assumpsit, and, secondly, the bankruptcy of *Clarke* on the 19th *November*, 1814, and an assignment by the commissioners to the assignees, on the 1st *December*, 1814, and that thereby the interest, title, and right to indorse the promissory note, before and at the time of the indorsement by *Clarke*, became vested in the assignees and not in *Clarke*, and the indorsement of *Clarke* was void, and created no right in the plaintiffs to sue. To that plea, the plaintiffs replied, that after the assignment to the assignees, the indorsement of *Clarke* was made by him with the consent of the assignees, and issue was taken and joined upon the fact of such consent, and the jury having found a verdict for the plaintiffs on the general issue, and for the defendant on the other issue, the question is, whether the plaintiffs be entitled to judgment, notwithstanding the verdict found for the defendant on the second issue. It must now be taken as a fact, that the indorsement was made by *Clarke* without the consent of the assignees, and then the question is, whether *Clarke*, having made such an indorsement without the previous consent of his assignees, could thereby transfer any interest in the note to his indorsee. Now, inasmuch as the note, which is a negotiable instrument, is made payable to *Clarke* or *his order*, and it is greatly to the advantage of commerce that such an instrument should be transferable by indorsement, we ought, according to the rules and principles of law, which are framed with a view to the general convenience of mankind, to give effect to the transfer of such a negotiable instrument, unless some plain

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against
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plain rule of law interfere to prevent it. Now is it a just conclusion of law, from the facts stated in the plea, that the right and title to indorse this note was vested absolutely in the assignees? I am of opinion that it is not. If the right and title to the note were vested absolutely in them, it would follow as a necessary consequence, that the right and title to every other chattel acquired by an uncertificated bankrupt after his bankruptcy would vest in them absolutely; but the case of *Webb v. For (a)* is an authority to shew that an uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, and that he may maintain trover for them against a stranger. It is clear, therefore, that the bankrupt has a property in such goods. The assignees have vested in them a right to interfere and claim the property; and if they do make any claim, it is effectual against the bankrupt and all the world; but if they do not interfere, then, as between the bankrupt, (or one claiming under him,) and his debtor, the latter cannot set up their title; but the bankrupt has a right, in a court of law, to enforce the payment of his debt. In *Kitch v. Bartsch* the assignees claimed the property.

BAYLEY J. I am of opinion that the plaintiffs are entitled to retain their verdict on the general issue, and that the verdict on the special plea is not sufficient to deprive them of the judgment in this case. This is an action upon a note payable to *Clarke* or to the order of *Clarke*. The defendant, therefore, by making such note, intimates to all persons that he considers *Clarke* capable of making an order sufficient to transfer the property in the note. The defence now set up is, that although he has issued a security to the world, importing on the face of it that *Clarke* was capable of making such an order, yet that in fact he was incapable. Now this is a fraud upon the public. It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, when he asserts by the instrument which he issues to the world, that the other has such power. Thus in *Taylor v. Croker* (a), before Lord *Ellenborough*, a bill was drawn by two infants; the defendants accepted, and the two infants indorsed, and it was held that inasmuch as the defendants had, by accepting the bill, admitted that the infants were competent to indorse, they should not be permitted afterwards to say that they were incompetent. So in this case the defendant has affirmed to the world that *Clarke* was capable of making an order. The facts are, that the bankrupt indorsed to *Knight* and *Freeman*, and that they indorsed to the plaintiffs, and that neither the plaintiffs or *K.* and *F.* knew that *Clarke* was a bankrupt. It is settled by many decided cases, that though an uncertificated bankrupt cannot resist the claim of his as-

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 Drawn
 against
 Dalt.

(a) 4 Esp. 187.

signees

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DAYTON
against
DALE.

assignees to any property which he has acquired since his bankruptcy, yet that he may acquire property and maintain actions in respect of it, unless the assignees interfere to prevent him. This question was much discussed in *Chippendale v. Tomlinson*. That was an action upon an attorney's bill. The defendant pleaded the bankruptcy of the plaintiff before the bill was incurred, and that plea was held insufficient, on the ground that the rights of the assignees were not to be taken into consideration, unless they themselves interfered. That case has since been followed by *Fowler v. Downe*, and other cases. It appears to me that as the defendant, by the form of his note, has stated that he will pay to *Clarke's* order, he cannot now allege *Clarke's* inability to make an order as a ground of defence to this action; and, secondly, that the bankrupt may acquire property subsequently to his bankruptcy, and retain that property against all the world, except his assignees.

HOLROD J. I think that the plaintiffs are entitled to the judgment of the Court upon the whole record, notwithstanding the verdict found for the defendant upon the special plea. The note was made payable to *Clarke's*

rights when he took it. Thus where a bill of exchange or promissory note, transferable by indorsement, has been lost or stolen, a person deriving his title through another who had no right to indorse, may transfer a right to an innocent indorsee. Here the defendant himself gives *Clarke* authority to indorse, and he asserts to all those who see the bill, that *Clarke* has that authority, and the assignees have not made any claim. I think, therefore, that the defendant is estopped from setting up their rights. It is not true that the assignment vests absolutely in the assignees all the property acquired by the bankrupt subsequently to his bankruptcy. It would be most injurious to the bankrupt if that were so, for if they were unwilling to sue, and he was unable to sue, the consequence would be, that he might lose property so acquired, and the residue of his property would remain liable to his debts. *Ashley v. Kell* (a) is an authority to shew that property, even the subject of trade and sale, so acquired by the bankrupt subsequently to his bankruptcy does not pass absolutely to the assignees, and if that be so, the property acquired by a bankrupt in a negotiable instrument, does not so vest in his assignees.

Judgment for the plaintiffs.

(a) 2 Str. 1207.

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DRAYTON
against
DALE.

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Friday,
November 14.The Earl of LONSDALE *against* NELSON and
Others.

Trespass for breaking and entering the plaintiff's manor. Pleas, first, general issue; second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public navigable river from time immemorial, and that there is in that part of the port which is within the manor, an ancient work necessary for the preservation of the port, and for the safety and convenience of the

TRESPASS for breaking and entering the manor of the plaintiff, called *Seaton*, and pulling down a quantity of wooden paling and fencing of the plaintiff, and erecting a quantity of wooden paling and fencing, and depositing there a quantity of timber, brick, stone, and rubbish. The second count was for breaking and entering the close of the plaintiff, but in all other respects like the first. Pleas, first not guilty. Secondly, that the close in the second count mentioned, and in which, &c. before and at the said several times when, &c. was, and from thence hitherto hath been, and still is within, and part and parcel of the said manor in the first count mentioned; and that, before and at the said times when, &c. there was, and from thence hitherto hath been, and still is, a certain ancient and public port, haven or harbour, called *Workington* harbour, partly within the said manor and close; and also in a certain

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Lonsdale
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that before and at the said several times when, &c. there was, and hath been within that part of the said port, haven or harbour, which is within the said manor and close, a certain ancient work or erection, of and belonging to the said port, haven or harbour, and which was and is requisite and necessary for the support, maintenance, and preservation of the said port, haven or harbour, for the rendering of the same, and the navigation thereof, safe and commodious for the ships and vessels resorting thereto, to wit, at, &c. And the defendants further say, that before any of the said several times when, &c. the said work or erection had been greatly damaged and injured, and was in great decay, and in a bad, ruinous, and dilapidated state and condition, for want of needful and necessary repairing and amending thereof; and that it so remained and continued until, and at the said several times when, &c.; and that before and at the said times, when &c. in the first and second counts mentioned, it was requisite and necessary for the support, maintenance, and preservation of the said port, haven or harbour, and for the keeping and preserving of the same, and the navigation thereof, in a safe and commodious state and condition for the ships and vessels resorting thereto, that the said work or erection should be repaired and amended; but that the plaintiff did not, nor would repair or amend the same or any part thereof, but wholly neglected so to do. Wherefore the defendants, whilst the said work or erection was so in decay, and in a bad, ruinous, and dilapidated state and condition as aforesaid, for the purpose of repairing and amending the said work or erection at the said times when, &c. in the said first and second counts mentioned, broke and entered the said manor

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The Earl of
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manor and close, in which, &c. and repaired and amended the said work or erection where the same was so in decay, and in a bad, ruinous, and dilapidated state and condition as aforesaid; and because the paling and fencing in the said first and second counts first-mentioned were part of the said erection, and in great decay, defendants pulled them down, and repaired the erection with the paling, fencing, bricks, &c. in the same counts secondly mentioned. The fourth plea stated, that a part of a *public navigable river* was situate within the manor and close; and that the work or erection in question in that part of the river, was requisite and necessary for rendering the navigation of the river safe and commodious, in other respects it was like the second. Replication, de injuria, &c. and issue thereon. At the trial before *Wood B.*, at the *Cumberland Summer assizes*, 1822, a verdict was found for the plaintiff on the issue on the first plea, and for the defendant on the issues on the second and fourth, and as to some other issues the jury were discharged from finding any verdict. In *Michaelmas term*, 1822, *Scarlett* obtained a rule nisi for entering up judgment for the plaintiff on the issues on the second and fourth pleas, non obstante veredicto,

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making the repairs has elapsed, and when the party repairing does not want to use the port or river. For the pleas in question do not aver notice, nor the lapse of a reasonable time, nor occasion to use the port or river. They do not even aver that the plaintiff was bound to repair. There is no statement that any one in particular is bound to repair; surely all the king's subjects are not bound to do it. The plaintiff might have been bound on account of his having dedicated the work to the public. *Hale de Port. Mar.* 78. But there is no allegation of that; and if he be not liable no one else is. But supposing that he is bound, no instance can be shewn where, under such circumstances, any person may repair according to his own judgment. If that were lawful, the obligation might be made doubly burthensome; for, first, it might be necessary to undo the imperfect repairs done by a stranger before proper and substantial repairs could be done. It will no doubt be contended, on the other side, that the pier or erection, in its delapidated state, was a nuisance, and that the defendant might therefore enter to reform it. But there is a distinction in this respect, between nuisances of commission and those of omission. There are several cases put in 2 *Roll. Abr.* 144. *Nuisance* (S), and *Vin. Abr. Nuis.* (S), as to the reformation of a nuisance by the party grieved, or by any individual of the public, and each of those is a case of commission. This distinction is supported by analogy to the writ of assize of nuisance. Now, that does not lie for neglect, but only for commission. 2 *Roll. Abr.* 141. *Nuisance Ass.* (H) *pl.* 9., citing 11 *H. 4. c.* 83., "If a man who ought to scour a ditch does not do it, by means whereof my field is drowned, no assize lies." The object of that writ is to give damages to the party, and to

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remove the nuisance; but the party grieved may enter and abate it; 17 *Ed.* 3. 44. 9 *Ed.* 4. 35. *Penruddock's* case (b); and if he does so, pending the writ, the writ shall abate; *Fitz. N. B.* 189. note (a). *Baten's* case. (c) It therefore seems, that where a party may have an assize of nuisance, he may, if he chooses, enter and redress the injury himself; but where he cannot have assize, there is nothing to shew that he can enter. Now it has been already shewn, that assize does not lie where the nuisance is merely one of omission; the party is then left to the common-law remedy by indictment. If that be the general rule, the pleas are clearly bad. But at all events they are bad for the want of an averment, that notice of the state of the pier was given to the plaintiff, or that a reasonable time for repairing it had elapsed. Such a work might very possibly sustain a sudden injury by a violent storm; yet, if these pleas are good, any person might enter and repair it the very next day, according to his own idea of what was necessary to be done. This argument *ab inconvenienti* appears conclusive.

E. H. Alderson, contra. There is not any solid distinction between nuisances of commission and those of omis-

scription. The only dictum to that effect is in *Brook Abr. Presentment in Court*, pl. 9.; and there a quære is added, with this observation, "It appears that the opinion is not law." Such a work differs materially in this respect from a high way: the parish are bound by the common law to repair the latter, and may be indicted, unless they can shew that some other person is liable. But whom could you indict for neglecting to repair such a work as this? If then no person be liable, the work being for the benefit of the public, any one may enter for the purpose of repairing. It is admitted on the other side, that an indictment would lie if such a work were pulled down; but contended, that the public are without remedy if it be suffered to fall. There are, however, many dicta, that any one may abate or reform a public nuisance, expressed in terms sufficiently general to embrace such a case as this. Lord *Hale*, *De Port. Mar.* pt. 2. c. 7., says, "Nuisances of ports are of two kinds. First, such as are immediately only nuisances to the private concernment of the lord of the franchise. Secondly, such nuisances as are common to all men that have occasion to come, go, or stay at ports. I will give instances of some: first, silting or choaking up the port, either by the sinking of vessels in the port, or throwing out of filth or trash into the port whereby it is choaked. Secondly, decays of the wharfs, quays, and piers, which are for the lading of merchandise and safeguard of shipping." Now the latter is clearly a nuisance of omission. After putting some other instances of this second sort of nuisances, Lord *Hale*, speaking with reference to all that had gone before, says, "Any man may justify the removal of a common nuisance either at land or by water, because every man is concerned in

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it;" and he makes no distinction between nuisances of commission and omission. There are many cases in which any one may justify interfering with the property of another to prevent an injury to the public. Thus, if a house in a street were likely to fall, it might be pulled down; or, if a bank of the sea were likely to break, and a festinum remedium were necessary, any one might apply it. So, according to *Mouse's* case (a), a house may be pulled down to prevent the spreading of a fire; which is a strong case, for there an injury is done to the individual for the public good. In *Bro. Abr. Nuis.* 28., it is said that a man is not bound to cut his trees which overhang the road, and therefore another may do it. If, then, no person is bound to repair the work in question, the defendant was justified in doing it. In *Rex v. Wilcox* (b), it appeared that the defendant being indicted for a nuisance, was convicted and fined; and it was moved, that by the general pardon the defendant was excused both as to the fine and the abatement of the nuisance. But the court held, that he should be discharged only as to the fine, and not as to the abatement; for that was not a punishment of the party, but a removal of that which was a grievance to other people,

The plea does not state how long the work had been ruinous, or that the plaintiff knew it was so, or that a reasonable time for repairing had elapsed, or that immediate repairs were necessary.] If the negative of any of those circumstances could have been proved for the plaintiff, they should have been replied; but as that was not done, it must, after verdict, be presumed that every thing necessary to justify the verdict was proved by the defendant.

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Parke in reply. It is not necessary to dispute the authorities cited on the other side, for they merely support a principle which does not arise on this record, viz. that any person may justify the removal of that by which his majesty's subjects are placed in immediate danger. There is nothing to shew that any such danger existed in this case. The question then rests upon the general authority to repair without notice, and before the lapse of a reasonable time, and without occasion, in the party repairing, to use the port. But it is said that the plaintiff is not bound to repair. The pleas seem to have been framed upon an opinion that he was so bound, for it is alleged that he did not nor would repair, but neglected so to do. But supposing him not bound, there is not any authority to shew that any person may repair. There might possibly be a dedication of the work to the public for so long as it would last; and then an indictment for removing it might be maintained, but not for suffering it to decay. As for the passage in Lord *Hale, De Port. Mar.*, where he is supposed to say that any one may abate a nuisance, with reference to those of omission as well as commission, it is somewhat singular that the example

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which he adds is a nuisance of commission. "The burgesses of Southampton justified the throwing down of a wear belonging to the Abbot of Tichford, in a creek of the sea, *quia levata fuit ad nocumentum domini regis et villæ Southampton et quod batelli et naves impediantur quominus venire possunt ad portum villæ.*" And he adds, "But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice."

ABBOTT C. J. I am of opinion that the plaintiff is entitled to judgment non obstante veredicto, on the second and fourth pleas. This was an action of trespass; the first count charged a breaking and entering of the plaintiff's manor, and the second count a breaking and entering of the plaintiff's close. The only difference between them is the substitution in the latter of the word *close* for *manor* in the former. On the general issue a verdict was found for the plaintiff. It was therefore established that he was entitled to the manor and close, and in possession of both; and the only question is, whether the special pleas are a good justification of that which was done. Now it is incumbent on him who pleads upon the land of another to shew that he has a right in the substance of the pleas is, that there is a harbour and navigable

is a further allegation, that this work was in a state of decay, and that the plaintiff did not nor would repair it, but neglected so to do; wherefore the defendants entered and repaired. The defendants have not alleged that immediate repairs were necessary, nor that any person bound to repair had neglected to do so after notice, nor that a reasonable time for making the repairs had elapsed. They have not even alleged that they had occasion to use the port or river; and for any thing that appears on these pleadings, they may have been mere volunteers, not at all interested in the preservation of the work in question, nor prejudiced by the want of those repairs which they thought fit to do. Upon these grounds I am of opinion that judgment must be entered for the plaintiff, on the issues on the second and fourth pleas.

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BAYLEY and HOLROYD Js. concurred.

BEST J. Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call

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on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord *Hale*, and appeal to a court of justice. It is not stated in this plea that this building had been out of repair for any time. An accident the day before it was repaired might have reduced it to the state in which it was found by these defendants. Neither does it appear that this building was immediately wanted, either for the safety or convenience of such as resorted to the port, or that these defendants ever had or were ever likely to have occasion to use it, or had any more right to interfere with the repairs of it than all the other subjects of the realm. If no person in particular be bound to repair, those who wish to do any repairs ought to give him on whose land they have occasion to enter for that purpose some notice of their intention, that he may decide whether he will not rather do what is necessary himself, than suffer the intrusion of strangers upon his estate. I am, there-

fore, of opinion, that the repairs must be executed.

1823.

NIGHTINGALE *against* MARSHALL and Another. *Friday,*
November 14th.

CASE for a false return to a writ of mandamus. In the parish of *W.*, the poor-rates, according to an ancient custom, had always been made without respect to the value of property in the parish, but according to the supposed ability of the party charged; Held, that persons so rated, were not rated in respect of any annual rent, profit, or value, within the meaning of the 58 G. 3. c. 69. s. 3., and therefore were not entitled to more than one vote at vestry meetings, although rated upon more than 50*l.*

The declaration stated, that on the 22d *November*, 1821, the office of sexton of the parish of *Saint Mary, Whitechapel*, became vacant; that the plaintiff was nominated and elected to the said office by a majority of the persons entitled to vote; that the defendants being churchwardens of the said parish, ought to have admitted the plaintiff to the said office, but they refused so to do; and in return to a writ of mandamus, issued on the 11th day of *February*, 1822, commanding them to admit the plaintiff to the said office, they falsely returned that the said plaintiff was not duly nominated and elected to the said office. At the trial before *Abbott C. J.*, at the sittings in *Middlesex* after last *Trinity* term, a verdict was found for the plaintiff with nominal damages, subject to the opinion of the Court upon the following case: The office of sexton for the parish of *Saint Mary, Whitechapel*, in the county of *Middlesex*, is an ancient office, and the right of election is in the inhabitants of the said parish, paying church and poor's rates, in vestry assembled. In *November*, 1821, the office became vacant, and on the 22d *November* a public meeting was duly holden for the election of a sexton. There were two candidates, the plaintiff and one *J. W.* While the election was proceeding, several inhabitants of the parish entitled to vote, claimed a right to give more than one vote under the 58 G. 3. c. 69. s. 3., by which it was enacted, "That in all such vestries every inhabitant present,

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present, who shall by the last rate, which shall have been made for the relief of the poor, have been assessed and charged upon, or in respect of, any annual rent, profit, or value, not amounting to 50*l.*, shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon, or in respect of, any annual rent or rents, profit or value, amounting to 50*l.* or upwards, whether in one, or in more than one sum or charge, shall have and be entitled to give one vote for every 25*l.* of annual rent, profit, and value upon or in respect of which he shall have been assessed or charged in such last rate; so, nevertheless, that no inhabitant shall be entitled to give more than six votes." At the close of the election the numbers were, for *J. W.* 639, and for the plaintiff 631; but if a plurality of votes was admissible in the parish of *Whitechapel*, with respect to the election of a sexton, pursuant to the 58 *G. 3. c. 69. s. 3.*, such a number of votes was tendered as was sufficient to give the plaintiff a majority of votes. The defendants were churchwardens of the parish at the time of the election, and they admitted *J. W.* to the office; and in return to a mandamus, commanding them

but the rate purports to be made, and, according to an ancient custom in the parish always, has been made, by the discretion of the vestry, without respect to value, but according to the ability of the party charged, such ability being estimated with reference to property, whether in the parish or out of it. In some instances the property is stated in respect of which the party is charged; but in a great majority of cases the property is not stated, and where it is stated, the rate is not in proportion to the rent of the property; for example,

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| Rent. | | Poor's rate. | Church-rate according to an equal pound-rate. |
|-------|-------------------------------------|--------------|---|
| £. | | £. s. | |
| 40 | <i>L. Turner</i> for two cooperages | 5 11 | |
| 40 | <i>Alexr. Mann</i> for house - | 10 15 | |
| 50 | <i>Mr. Lucas</i> for house - | 9 10 | |

The case was now argued by

F. Pollock for the plaintiff, who contended, that notwithstanding the mode of rating according to the ability of the party charged, and without respect to value, still as the rating was “*in respect of*” some annual rent, profit, or value, the amount of which was ascertained for the purposes of the church-rate, the statute 58 G. 3. c. 69. applied in principle, and was applicable in point of fact. The rate for the church was an equal pound-rate; and although the poor-rate was not in proportion to annual value, it was according to the words of the act, “in respect of it,” for no person could be rated except with reference to some annual value. The intention of the legislature appeared to be, to give a preponderance to property. The right to give more than one

1823. one vote depends merely on being assessed in respect of annual value of 50*l.* or upwards; and the statute refers to the property, and not the amount of the rate. A statute so beneficial ought to be liberally construed; and unless the Court should construe "in respect of" to mean the same as "in proportion to," the present case was within its provisions.

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Parke contra was stopped by the Court.

ABBOTT C. J. I give no opinion as to the validity of the rates in question. My opinion is founded entirely on the third section of the 58 G. 3. c. 69., which provides for a plurality of votes. By that section it was enacted, "that every inhabitant who shall by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit, or value, not amounting to 50*l.*, shall have and be entitled to give one vote and no more; and if upon an annual rent profit, or value, amounting to more than 50*l.*, he shall have one vote for every 25*l.*, of annual rent, &c.



provisions of the 58 G. 3. c. 69. respecting a plurality of votes, do not apply to the parish in question; the plaintiff, consequently, was not duly elected to the office of sexton, and a nonsuit must be entered.

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BAYLEY J. I am of opinion that this parish is not within the operation of the 58 G. 3. c. 69. s. 3. The general rule is, that there shall be an equal pound-rate upon the property in the parish therefore all persons having an estate equal in value contribute the same sum. The value of their property is the criterion of the rate. It was the intention of the legislature, by the statute referred to, to increase the power which each inhabitant would have at the vestry-meetings, in proportion to the burthen borne by him. This parish cannot have the benefit of that act, for the custom (which may be legal) to make the rate in a particular mode, prevents the property of any individual in the parish being a criterion of the burthen borne by him. We cannot then say that the rate is imposed in respect of any annual rent, profit, or value; and unless that be so, the provision for a plurality of votes does not apply.

HOLROYD J. The rate stated in this case is not such as to bring the parish within the provisions of the third section of the 58 G. 3. c. 69. To be within that, the parties must be assessed upon some annual rent, profit, or value: the rate does not shew that they have been so assessed. Certain rents are stated, but the inequality of the rate shews that it is not imposed in respect of those rents; nor does it appear to have been imposed in respect of any profit or value, much less annual profit or value. It is left uncertain in respect of what

1823. what it is assessed, and therefore is quite insufficient to
make the 58 G. 3. c. 69. s. 3. applicable to their vestry
meetings.
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BEST J. If the inhabitants of *St. Mary, Whitechapel*, are anxious to avail themselves of the provisions in the vestry act, they must alter their mode of rating. By that act it is not sufficient that the parties should be rated at 50*l.* or upwards; to have more than one vote, they must be rated in respect of annual rents, profit, or value. Now it is stated in the case that each inhabitant is rated according to the discretion of the vestry, and the rate itself shews that the amount of it is not regulated by the amount of property in the parish. If so, it cannot be made according to the principle laid down in the act; and therefore no person can, by virtue of that act, be entitled to a plurality of votes. I therefore agree that a nonsuit must be entered.

Judgment of nonsuit.

Friday, JONES and HIRST against R. SIMPSON, Sir J.



merchant, in partnership with the defendant *Wilson*, of *Quebec*, in *Canada*, such business being carried on in *London* in the name of *Simpson* alone, and at *Quebec*, under the firm of *G. Wilson* and Co. In the year 1811 *W. Blackburn* delivered to *Simpson* twelve bales of woollen cloth, invoiced at 1640*l.* 17*s.* 10*d.*, to be shipped and consigned to the firm of *G. Wilson* and Co. at *Quebec*, to be sold there on the account and at the risk of *Blackburn*. They were duly shipped by *Simpson*, and consigned to and received by the firm of *G. Wilson* and Co. at *Quebec*, by whom the same were sold, and the proceeds, or some parts thereof, were afterwards remitted to *Simpson*. On the 7th of *August*, *Blackburn* wrote and sent to *Simpson* the following order: “*Mr. R. Simpson*, please to pay to *Nelson*, on account of the assignees of *Oakley, Overend, and Oakley*, the proceeds of a shipment of twelve bales of goods, value about 2000*l.*, consigned by me to you. On the 21st of the same month, *Simpson* wrote and sent to the defendant *Nelson*, as one of the assignees of *Oakley, Overend, and Oakley* the following undertaking: “Shipped on board the *Sarah*, from *London* to *Quebec*, for the account of *W. Blackburn*, twelve bales of woollen cloth, value, as per invoice, 1640*l.* 17*s.* 10*d.*; there to be sold, and the proceeds to be paid by his order, dated the 7th instant, to the assignees of *Oakley, Overend, and Oakley*. In pursuance of the said order of *Blackburn*, I do hereby consent and engage to pay over the full amount of the net proceeds of the said twelve bales of woollen cloths, as I may from time to time receive the same, unto the said assignees without delay.” On the 15th *July*, 1812, a commission of bankrupt issued against the said *W. Blackburn*, under which the plaintiffs, *Jones* and *Hirst*,

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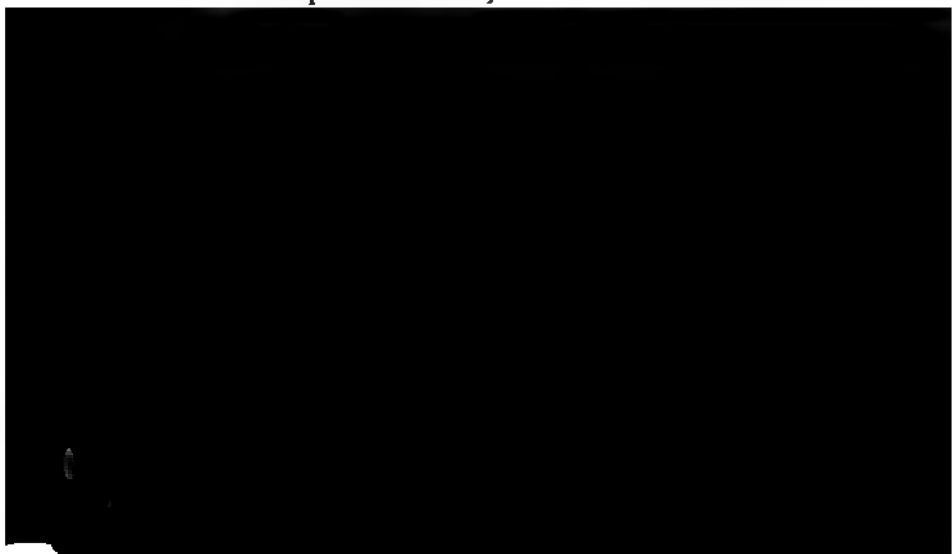
Jones
against
Simpson.

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Hirst, were chosen assignees. Pursuant to an order made in this cause, bearing date the 23d day of *July*, 1818, *Simpson* paid into the Bank of *England*, in the name of the Accountant-General, in trust in this cause, the sum of 409*l.* 5*s.* 7*d.*, in respect of the proceeds of the said bales of woollen cloths. *Simpson* has since become bankrupt, and the defendants *W. Fulford* and *T. Bradley* are the assignees under the commission against him. The question for the opinion of this Court was, whether the above two instruments, or either, and which of them, require such a stamp as the stamp acts impose upon bills, drafts, or orders for payment of money.

Littleale for the plaintiffs. The 48 G. 3. c. 149. was the stamp act in force at the time when these instruments were signed. Now in schedule, part 1., title *Bill of Exchange*, certain duties are first imposed upon bills, with reference to the sums for which they are made payable; and then upon any bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated period, where the total amount of the money shall be specified therein, or can be ascertained there-



on a bill for the sum expressed only. [*Abbott C. J.* Here no specific sum was expressed. Suppose the order be to pay all the money due, what is the duty to be imposed?] The schedule then proceeds to declare, that several instruments shall be deemed bills, drafts, or orders for the payment of money, and one of them is a draft or order for the payment of a sum of money out of a particular fund, which may or may not be available. Now here the order is for the payment of the proceeds of a shipment, value about 2000/., or in other words, for the payment of a sum of money out of a fund which may or may not be available, and when the amount of those proceeds was ascertained, a stamp appropriate to a bill for that amount ought to have been affixed to the instrument. A similar clause in the stamp act 55 G. 3. c. 184. was considered to apply to an instrument of this description, in *Firbank v. Bell* (a), and *Butts v. Swan*. (b) There indeed the sums payable were specified upon the face of the instrument. [*Bayley J.* The act imposes duties upon bills of exchange and promissory notes, which were well known instruments. There were other instruments, however, nearly in the same form, but which did not come within the description of bills of exchange or promissory notes, because the money was payable out of a particular fund, or upon a contingency, and the legislature probably had those instruments in contemplation in the clause which has been referred to. This instrument, however, would not be a bill of exchange if the proceeds were not payable out of a particular fund, because the order was not for a specific amount.]

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against
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(a) 1 B. & A. 36.

(b) 2 B. & B. 78.

1833.

*James
against
Sutton.*

Marryat was to have argued on the other side, but the court said the case was too clear to admit of any doubt.

The following certificate was afterwards sent :

This case has been argued before us, and we are of opinion that neither of the two instruments required such a stamp as the stamp acts impose on bills, drafts, or orders for the payment of money.

C. ABBOTT.

J. BAYLEY.

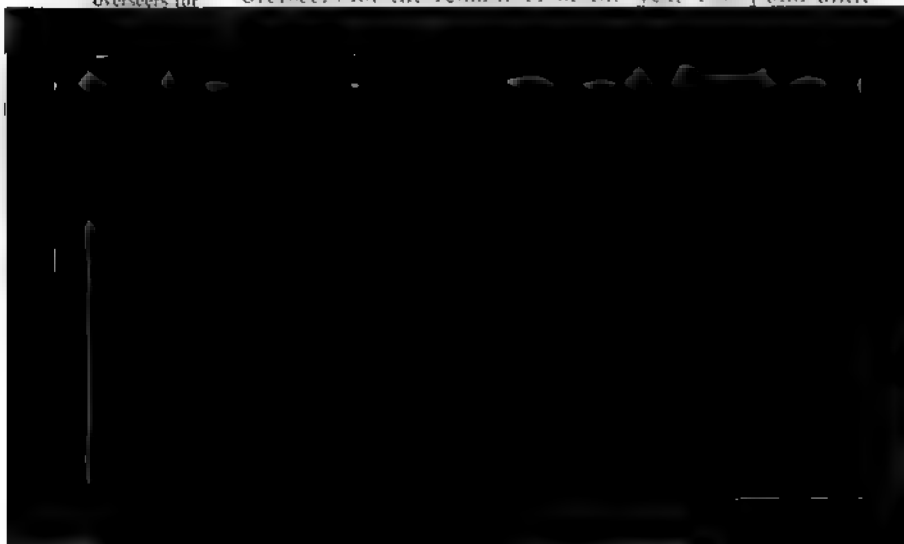
G. S. HOLROYD.

W. D. BEST.

The KING *against* PINNEY and Another.

A local act directed that the then overseers of the parish of *W.* should continue to be overseers for

BY statute 47 G. 3. sess. 2. c. 111. s. 92. (local and personal acts) it was enacted that the then overseers of the parish of *Woolwich* should continue to be overseers for the remainder of the year 1807, and until



sessions confirmed that order: A rule nisi having been obtained for quashing the order of sessions

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against
PINNEY.

Bolland and *Andrews* now shewed cause, and contended, that although the local act compelled the justices to appoint two overseers, it did not restrain them from appointing more than two. In *Rex v. Lott* (a) it was held, that under the statute of *Elizabeth* more than four could not be appointed, but there the number fixed being four, three, or two, clearly shewed that it was the intent of the legislature to prevent the appointment of a greater number; now here, before the local act, more than two might have been appointed, and there are no express words in that act denoting the intention of the legislature to make any alteration in that power. The act only requires that two, at all events, shall be appointed.

Scarlett and *Adolphus* contra contended that as the local act expressly directed that two should be appointed, it must be taken that the legislature intended that the overseers should not exceed that number.

ABBOTT C. J. It is a general rule of construction that affirmative words in a later statute do not repeal a former, unless there be something wholly inconsistent in the provisions of the two statutes. Lord C. B. *Comyns*, in his *Digest*, tit. *Parliament*. R. 25., lays it down that such affirmative words do not take away a former statute, unless they in sense contain a negative. Now the statute of *Elizabeth* directs that the overseers for parishes shall be four, three, or two substantial

(a) 1 Burr. 445.

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against
Penny.

householders. The local act merely directs that the then overseers should continue in office to the end of the year, and until two others should be appointed, and that two others should be annually appointed. These words do not, in sense, contain a negative, nor is there any inconsistency between a provision authorizing the appointment of four, three, or two overseers, and another directing the appointment of two. The latter statute requires absolutely that two shall be appointed, but it does not say that more than two shall not be appointed. That being so, I am of opinion that the provision of the statute of *Elizabeth* as to the appointment of overseers, is not repealed by the local act, and that the order of justices was right.

Rule discharged. (a)

(a) See *Floden*, 112, 115., and *Rea v. Burridge*, 5 *Pearse W.* 461.

Saturday.
November 22d.

The King against ANTHONY COLLETT, Clerk.



unable to make any improvements on their lands, and consequently have employed very few labourers, by which means a considerable part of the labouring population has been totally unemployed, and during this period, all poor persons belonging to the parish, who have been unable to obtain employment, have received sums of money for their maintenance from the parish officers in proportion to the number of their respective families, for which no labour has been required from them. The appellant being dissatisfied with this application of the parish funds, appealed against the overseers' accounts. The respondents, upon the hearing of this appeal, admitted that the persons to whom the sums objected to in the account were paid, were in fact both able and willing to work, but that no employment could be obtained for them, which the appellant contended, the overseers were bound to provide pursuant to the statute of the 43 *Eliz. c. 2.*, although no evidence was adduced to prove that the overseers could have employed the labourers. It also appeared, that none of the sums objected to were paid under or in consequence of any orders from a magistrate. The parishioners were accustomed to meet once a week at the parish workhouse, at which meetings all applications for relief were received, and where all labourers belonging to the parish, who had not in the preceding week been in constant employment, attended to give an account of their earnings, and received such sums as, with the earnings, should amount to a sum deemed competent to their maintenance in proportion to the number of their children. In several cases, it appeared that able bodied men with four or five children, having had no employment in the preceding week, received from the over-

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against
COLLETT.

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against
Gallant.

appears from 7s. to 8s. 6d. for the week; having been employed three days, 3s. 6d. to 4s. per week; having been employed two days, 5s. per week, and so in proportion to the number of their children and the amount of their week's earnings. And in all cases this relief was afforded to these persons, solely on the ground of their having been put of employment, without reference or enquiry as to any means they might have of raising money for the supply of their immediate wants by sale or pledge of their household effects; and that in many instances, the weekly relief was afforded to various able bodied labourers for many weeks in succession.

Cooper and Biggs Andrews in support of the order of sessions. Three questions arise in this very important case. First, whether able bodied persons are entitled to relief under the provisions of the 43 Eliz. c. 2.; secondly, whether they are entitled to relief unless the overseers set them to work; and, thirdly, whether they are entitled to relief without a specific order from a magistrate. As to the first, overseers may give relief to poor persons capable of working, but unable to find employment. The 43 Eliz. c. 2. s. 1. authorises the raising of "competent sums of money, for and towards the necessary relief of the poor, old, blind, and such other

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Eyres J., speaking of one of the parties then before the court, says, “*Joseph* having more children than he could maintain, is *impotent*, as much as if he had been so by lameness.” And that is a reasonable construction, for it would be extremely unjust to say, that persons able and willing to work, but out of employment, are not to be relieved; inasmuch as the distress which they suffer does not arise from any fault of their own, or from any cause over which they have the slightest control. The 8 & 9 *W. 3. c. 30.* (certificate act) confirms this view of the case. The preamble begins by reciting, “Foras- much as many poor persons chargeable to the parish, &c. where they live *merely for want of work*, would in any other place where sufficient employment is to be had, maintain themselves and families;” now, that plainly shews that the legislature considered a pauper out of employment entitled to relief on that ground. And the 9 *G. 1. c. 7.* which provides, that no justice shall order relief to any poor person until oath be made of some matter, which he shall judge to be a reasonable cause of having such relief, and of certain other things having been done which are there pointed out, impliedly gives power to the justice to order relief where any reason- able cause of giving it exists; and it is surely a sufficient cause for having relief, that a person able and willing to work is unable to find employment. Then, secondly, such paupers are entitled to relief although the overseers do not set them to work. For a long series of years no stock has been provided by overseers according to the mode pointed out by the 13 *Eliz. c. 2.*, and for this plain reason, that since that statute was passed, every description of manufacture has been so much improved, that the articles manufactured under the directions of

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the overseers would not be saleable; and, therefore, providing materials for the poor to work upon would only bring an unnecessary burthen on the parish. And the 43 *Eliz. c. 2.* is not imperative but discretionary, for it says in section first, that “the churchwardens and overseers shall *take order* from time to time, by and with the consent of two or more justices of peace for the county, for setting to work the children of all such whose parents shall not by the said churchwardens or overseers, or the greater part of them, be thought able to keep and maintain their children; and also for setting to work all such persons married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by.” The expression “to take order,” shews that they were to exercise their judgment upon the propriety of setting to work the persons pointed out. But if it be imperative, although the overseers may be indicted for disobeying the statute, still the poor are in the mean time entitled to relief. If there be no law authorising the giving of money to poor persons out of employment, there is none to authorise the giving of it to those who are fully employed, but unable to obtain wages sufficient for their maintenance. But the 9 *G. 1. c. 7. s. 2.* shews that the law is not so, for it is there enacted, that “no officer of any parish shall, (except upon sudden and emergent occasions,) bring to the account of the parish *any monies* he shall give to any *poor person* of the same parish (not “monies laid out for materials,”) who is not registered in the books to be kept by the parish (*a*), as a person entitled to receive collection, on pain of forfeiting the sum of 5*l.*” This statute

(a) See 3 & 4 *H. & M. c. 11. s. 11.*

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recognises a power to give money to any poor person, and does not confine those entitled within the description in the 43 *Eliz. c. 2.*, even supposing that description is to receive the narrow construction which will be contended for on the other side. Thirdly, the overseers were justified in giving relief without a specific order from a magistrate. The case certainly is not within the last cited statute for want of such order, but it is within the 36 *G. 3. c. 23. s. 1.*, by which it is enacted, "That it shall be lawful for the overseers of any parish, &c. with the approbation of the parishioners, or the majority of them, in vestry or other usual place of meeting assembled, or with the approbation in writing of any of his majesty's justices of the peace acting for the district, to distribute *and pay* (plainly meaning the giving of money,) collection and relief to any industrious poor person or persons at his, her, or their homes, &c. under certain circumstances of temporary illness or distress." It is stated in this case, that the parishioners were accustomed to meet once a week at the parish work-house, at which meetings all applications for relief were received. The overseers have, therefore, complied with the first part of the alternative in the 36 *G. 3. c. 23. s. 1.*, and are entitled to have the sums in dispute allowed. The persons relieved are stated to have been out of work, now that was a temporary distress, the duration of which was quite uncertain; and, although it might continue for several weeks, would still be within the meaning of the act. And as the parishioners, who have to support the poor, are also to decide upon their claims to relief, that circumstance is a sufficient check to prevent any improper expenditure of the parish funds by the overseers of the poor.

Scarlett

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Scarlett and Eagle, contra. The overseers of the poor are not, by the 43 *Eliz. c. 2.* warranted in giving pecuniary relief to persons able to work, without requiring work from them, and that power has not been enlarged by any subsequent statutes. It has been pretty generally taken for granted, that the 43 *Eliz. c. 2.* was the first legislative provision for the maintenance of the poor, but that is an erroneous supposition. It certainly embraces all the former laws, and was the result of all the experience then obtained upon the subject: but there are earlier statutes, and some of them throw light upon the question now under consideration. There is not, however, in any one of them, a single expression which gives colour to the idea, that any persons are entitled to relief in money, unless as a remuneration for their labour, except those who are unable to labour, by which a physical inability must be understood. The preamble of the 5 *Eliz. c. 2.* is worthy of much attention; "to the intent that idle and loitering persons and valiant beggars be avoided, and the *impotent, feeble, and lame*, which are the poor in very deed, should be hereafter relieved and well provided for." It then enacts, "that a book shall be kept in which the names of all householders

such labour as they be fit and able to do." Here, then, was an enactment that provision should be made for the poor, and the means of making that provision are pointed out, viz. by setting to work those who were capable of working, and giving pecuniary relief to the impotent. Nothing could more clearly shew the intention of the legislature upon this point, than the provision that those not wholly impotent should do as much work as they were able. No material alteration was made by any subsequent statute, until the whole of them were incorporated in the 43 *Eliz. c. 2.*, the first section of which enacted, "that the overseers should raise weekly or otherwise, by taxation, in the manner there specified, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work, and also competent sums of money, for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work, and to do and execute all other things, as well for the disposing of the said stock, as otherwise, concerning the premises, as to them shall seem convenient." Now there is nothing in that enactment which binds the overseers to employ the poor in any particular work. The means of employing them pointed out by the act are only to be adopted if they should be thought the best. The overseers are expressly authorised to do such other things touching the premises, that is, the employment of the poor, as to them shall seem convenient; that gives them authority to instruct the poor in trades; and if the labour of the poor becomes unnecessary in the old channels, it is the duty of the overseers to divert it into a new one. It is not contended, that a person out of employment is to be suffered to starve, because
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he is able to work, or that he is not entitled to relief, but that relief must be provided by setting him to work in some way or other. The construction which has been put upon s. 7. of the 43 *Eliz. c. 2.*, strongly corroborates the idea, that *impotent* in the first section means those physically unable to work. That section enacts, "that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work (being of sufficient ability), shall at their own charges relieve and maintain every such poor person in that manner and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, at their general quarter sessions shall be assessed." The dictum of *Eyres J.*, in the case of *Waltham v. Sparks*, has been referred to, as shewing that the word *impotent* includes those who cannot obtain employment; but when the case itself is examined, it appears not to justify any such conclusion. It was an action of debt on a bond, conditioned to save the parish of S. harmless from *John Godion*, his wife and children; defendant pleaded non-damnificatus; plaintiff replied, that *Joseph*, son of *John*, born at the time of the ob-

of *Eyres J.* was quite unnecessary and extra-judicial. Then, in *Rex v. Gulley (a)* an order, made under 43 *Eliz. c. 2. s. 7.*, set out, that one *M. G.* was in a *poor, destitute* condition, and that her father was able to maintain her; and the order was quashed, because it did not appear that she was *lame, blind, or unable to work.* So in *Rex v. Litton (b)*, upon complaint that *A.* was deserted and impotent, the justices adjudged and awarded the father to pay so much a week, and the order was quashed, because there was no *adjudication* that she was *impotent.* These decisions were recognised and acted upon in *Rex v. Hayworth (c)*, and in *Rex v. Stoke Ursey (d)*, and *Rex v. Tipper. (e)* The same words are used in the first section of the 43 *Eliz. c. 2.*, to point out who are to receive pecuniary relief from the parish, as are afterwards introduced into the seventh, respecting the support of parents by children, or the reverse. The orders under those sections are made in *consimili casu.* Now it is clear, that a good order cannot be made upon a parent to support a child, unless it be shewn that the child is impotent; and it would be absurd to say that a similar order upon the parish would be valid. The next statute bearing upon this question is, the 13 & 14 *Car. 2. c. 12.* The third section of that act enables persons to go out of their own parish to work in another, taking with them a certificate that they belong to the parish which they leave, and it provides that “if they shall not return when their work is finished, or shall

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(a) *Fuley*, 47. 1 *Bott.* 366. *S. C.*(b) 1 *Bott.* 366.(c) 1 *Str.* 10. 1 *Bott.* 402. *S. C.*(d) 1 *Bott.* 403. *n.*

(e) 1 *Bott.* 403. *n.* See also *Kilbeck's case*, 2 *Keb.* 37. pl. 79. *Rex v. Grant*, *ib.* 537. pl. 61. *Rex v. Payn*, *ib.* 643. pl. 75. *Rex v. May*, *ib.* 744. pl. 50. An anonymous case, 5 *Mod.* 397. ca. 200.; and *Kim-malton v. Laystas*, 2 *Bulst.* 347.

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fall sick or impotent, whilst they are in the said work; it shall not be accounted a settlement; but they may be removed to the place whence they came. There the word *impotent* clearly means unable to work, not unable to procure work. The subsequent part of the same section enacts, "That if the churchwardens and overseers of the poor of the parish to which such persons shall be removed refuse to receive them, and to provide work for them, as other inhabitants of the parish, they shall be subject to indictment." Nothing could be a plainer recognition of the obligation, to find work for those out of employment, imposed on the overseers. Then followed the 3 & 4 W. & M. c. 11., to which, perhaps may be traced the present practice of allowing relief in money to persons not included in the description; in the first section of the 43 Eliz. c. 2. The latter statute left the distribution of the funds collected in the discretion of the overseers, subject to no other control than the allowance of their accounts; that power was abused, as appears by the recital in the 3 & 4 W. & M. c. 11. s. 11. which then provides "that books shall be kept, and the names of those who receive collection registered therein, together with the causes of their relief; and that no person not entered in the books shall be allowed to receive collection at any church or chapel within the parish of which he is a member."

description of persons a claim to it, but merely regulates the distribution of the money collected. If a justice, under that act, put a person on the collection list to receive money, it was necessary that he should be described as impotent. The 8 & 9 W. 3. c. 30. does not support the position for which it was cited on the other side. It certainly recites that persons are chargeable to the parish, "merely for want of work," but that has never been denied. Such persons are to have relief, but that must be given by finding them work, there is no power to give them money, without requiring work from them, and the legislature never seem to have contemplated any different mode of relief, whether the labour should prove profitable or not. The second section of that act is a clear legislative recognition of the principle now contended for. It is expressly stated that the enactment therein contained was made "to the end that the money raised only for the relief of such as are *as well impotent* as poor may not be misapplied and consumed by the idle, sturdy, and disorderly beggars." The 9 G. 1. c. 7. s. 1. also has been cited on the other side, but that only required that certain directions should be complied with before any poor person had relief; it did not alter the mode of giving relief, nor is there a single expression in it to justify the opinion that those able to work, but out of employment, were to receive pecuniary relief. One great object of the statute was the establishment of poor-houses for the "lodging, keeping, maintaining, and employing the poor." The 22 G. 3. c. 83. was made in *pari materiâ*: that authorized the union of different parishes for the purpose of better enabling the overseers of the poor to employ those out of work, and does not authorize the administration

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against
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tration of relief in any other mode. The 36 G. 3. c. 23. was merely intended to obviate the necessity of sending the distressed to the poor-house under all circumstances. The temporary distress there mentioned is such as might arise from frost or floods, or accidental causes of that nature, the termination of which could be fairly calculated upon, and clearly does not include the case of persons out of work, and who have not any prospect of obtaining employment. (a)

ABBOTT C. J. It does not appear upon the case before us that the overseers of the poor considered them-

(a) There are several statutes earlier in point of time than the 43 Eliz., which throw some light upon the principal point discussed, but not decided, in this case, viz., whether the overseers of the poor are or are not justified in giving pecuniary relief to the able bodied poor when out of employment, without setting them to work? An express power to give such relief to such persons certainly is not contained in any of those statutes; and when the various steps are examined by which the legislature gradually advanced from their first crude provisions to the more mature enactments of the 43 Eliz. c. 2., it appears that no such power was up to that time given by implication.

By the 22 H. 8. c. 12. s. 1. intituled "An act concerning the punishment of beggars and vagabonds," it was enacted, that the justices of the peace in all and singular the shires, &c. within the limits of the r commis-

themselves bound to provide work for the unemployed poor, if that were practicable ; nor whether they in any way endeavoured to attain that object. Before we determine

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The 27 H. 8. c. 25., intituled " An act for punishment of sturdy vagabonds and beggars ;" after reciting that no provision is made for the persons mentioned in the third section of the last cited act after they get home, provides that the poor shall be supported by alms, so that they shall not be obliged to beg and wander about, and that all sturdy vagabonds and valiant beggars shall be caused and compelled to be set and kept to continual labour, in such wise that by their said labour they may get their own living ; and sect. 4., provides that the churchwardens and two others of every parish shall collect alms in such good and discrete wise as the poor, impotent, lame, feeble, sick, and diseased people, being not able to work, may be provided, holpen, and relieved, so that in no wise they be suffered to go openly in begging ; and that such as be lusty, or having their limbs strong enough to labour, may be daily kept in continual labour, whereby every one of them may get their own subsistence and living by their own hands.

The 1 Ed. 6. c. 3., intituled " An act for the punishment of vagabonds, and for the relief of the poor and impotent persons," in sect. 1., provides that, " If any man or woman, not being lame, impotent, or so aged or diseased with sickness, that he or she cannot work, not having lands, &c. whereon they may find sufficiently their living, shall either like a serving man wanting a master, or like a beggar, be lurking in any house, or wandering by the highways, not applying themselves to some honest labour, nor offering themselves to labour with any that will take them, and if no one will otherwise take them, do not offer to work for meat and drink, they shall be taken for vagabonds. By sect 9., after reciting that forasmuch as there are many maimed or otherwise lamed, sore, aged, and impotent persons which resort to the city of *London*, &c. begging, who, if they were separated, might easily be nourished in the places where they were born, it was enacted that the mayor, constables, and head officers of the cities, &c. to which such resort shall be, shall see all such idle, impotent, maimed, and aged persons, who otherwise cannot by their discretions be taken for vagabonds, which were born within the said cities, &c., or have resided there for three years, to be provided for. Sect. 10. provides for the removal of such as were not born in the place where found, nor had been conversant there for three years. Sect. 11. was as follows : " Provided always, that if any of the said aged, maimed, or impotent persons of the cities, towns, or villages where they were born in, or had

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termine whether the overseers were or were not justified in giving pecuniary relief to the unemployed poor, the case must go down to the sessions again, that we may be informed

their most abiding as aforesaid, be not so lame or impotent but that they may work in some manner of work, that then such town, parish, or village do either in common provide some such work for them as they may be occupied in, or appoint them to such as will find them work for meat and drink."

The 5 & 4 Ed. 6. c. 16., intitled "An act touching the punishment of vagabonds and other idle persons," repeated the 1 Ed. 6. c. 8., and revived the 22 H. 8. c. 12.; but contained clauses 4, 5, and 6., corresponding to 9, 10, and 11. of the act repeated.

The 5 & 6 Ed. 6. c. 2., "For the provision and relief of the poor," has this preamble, "To the intent that valiant beggars, idle and loitering persons may be avoided, and the impotent, feeble, and lame provided for, which are poor in very deed;" and confirms 22 H. 8. c. 12. and 5 & 4 Ed. 6. c. 16. Sect. 2. enacts that a register shall be kept of all households and inhabitants in each parish, and of such impotent, aged, and needy persons as are not able to live of themselves, nor with their own labour, that two collectors shall be appointed yearly, and that the collections shall be distributed to the poor in the same manner as was afterwards provided by the 5 Ed. 6. c. 8. (particularly noticed in the argument).

The 2 & 3 Ph. & M. c. 5. was the next act on this subject. The preamble was the same as of the last cited statute. By sect. 1. it confirmed the 22 H. 8. c. 12. and 5 & 4 Ed. 6. c. 16.; and sect. 2. is similar to the same section of the 5 & 6 Ed. 6. c. 2. Sect. 7. provides, "That if it shall chace any parish to have in it more poor and impotent folks not able to

informed whether any, and if any what endeavours were made to procure employment for them. All that the court can now say is, that undoubtedly it is the primary duty of

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shall happen to dwell." Sect. 16., after this preamble, " Forasmuch as charity would that poor, aged, and impotent persons should as necessarily be provided for as the said rogues and vagabonds and sturdy beggars repressed, and that the said aged, impotent, and poor people should have convenient habitations, &c. to settle themselves upon, to the end that they should not beg or wander about," provides for the keeping a register of the poor, finding habitations, levying money for their support by assessment, and for the appointment of overseers. Sect. 22. enacts " that, if any of the said aged and impotent persons, not being so diseased, lame, or impotent, but that they may work in some manner of work, shall be by the overseers of their said abiding place appointed to work, if they refuse, then to be whipped and stocked for their first refusal, and for the second refusal, to be punished, as in case of vagabonds in the first degree of punishment ;" (several degrees of punishment had been before provided for vagabonds). Sect. 23. appears to be very important ; it is as follows : " Provided always that three justices of the peace, whereof one to be of the quorum, of and with the surplusages of the said collections, &c. (the said poor and impotent people satisfied and provided for), shall, by their discretions, in such convenient place and places within their shires as they shall think meet, place and settle to work *the rogues and vagabonds that shall be disposed to work*, born within their said counties, or there abiding for the most part within the said three years, there to be holden to work by the oversight of the said overseers, to get their livings, and be sustained only upon their labour and travail." Here, then, is the first clear legislative enactment for providing work for the able-bodied poor. Until this time, it seems to have been taken for granted, that all able-bodied persons could find employment if they pleased ; and the very fact of their being out of work, and living by charity, made them, in the eye of the law, rogues and vagabonds, liable to be apprehended and punished. No relief of any kind was to be provided for them at the public expence ; those enactments which ordered that they should be kept to hard labour, seem merely to have made it the duty of certain persons to see that they did continually work, as if it were assumed that employment could always be found. The last-mentioned statute, which enacted, that to a certain extent work should be provided, so far from authorising the affording relief by money to such persons, expressly says, that " they are to get their livings, and to live and be sustained only upon their labour and travail." This was mani-

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of the overseers to find employment for the poor if possible. And I express that opinion now for the sake of the poor themselves, to whom no greater kindness can be

fastly a very imperfect provision, and no reason for the enactment is distinctly stated, but it may be collected that some persons, apprehended as rogues and vagabonds, had expressed a willingness to work if they could find employment; for it speaks of the *rogues and vagabonds that shall be disposed to work*. This is rendered more clear by the 18 Edw. c. 3., made to amend the former act, and intitled "An act for setting the poor on work, and for the avoiding of idleness." Sect. 4. runs thus, "Also to the intent, youth may be accustomed and brought up in labour and work, and then not like to grow to be idle rogues, and to the intent also that such as be already grown up in idleness, and so rogues at this present, may not have any just excuse in saying that they cannot get any service or work, and that other *poor and needy* (not impotent) persons, being willing to work, may be set on work. Be it enacted, that a competent store and stock of wool, hemp, &c. shall be provided, to be committed to the care of persons to be appointed collectors and governors of the poor, who are to dispose, order, and give rules for the division and manner of working the said stock, to the intent every such *poor and needy* person, old or young, able to do any work, standing in necessity of relief, shall not for want of work go abroad, either begging or committing pilferings, or other misdemeanours, *living in idleness*." It then goes on to provide that part of the stock shall be given to each poor person to be worked up, and that when he shall bring it back worked up, the overseers shall pay him for his labour, and sell the articles manufactured, and with the money

be done than by enabling them to earn their own living by labour, instead of suffering them to eat the bread of idleness,

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against
Coke.

39 & 40 *Eliz. c. 3.*, which it is unnecessary to notice, as all the provisions of it are embodied in the 43 *Eliz. c. 2.* It appears by *Lambard's Eirenarcha*, chap. 7. p. 206., that soon after the passing of the latter statute, certain resolutions, commonly ascribed to her majesty's justices at *Westminster*, were pretty generally known, and considered as tending to the right execution of the law. The eighth and ninth resolutions are applicable to the present question. "If the parents be able to work, and may have work, they are to find their children by their labour, and not the parish; but if they be overburthened with children, it shall be a very good way to procure some of them to be placed apprentices according to the statute." "No man is to be put out of the town where he dwelleth, nor to be sent to their place of birth (or last habitation) but a vagrant rogue, nor to be found by the town, *except the party be impotent*, but ought to set themselves to labour, if they be able and can get work; if they cannot, the overseers must set them to labour." There is not in any of those resolutions (twenty in number) any recognition of a power in the overseers to give relief to able-bodied persons, otherwise than by finding them employment. Whether any subsequent statute has altered the law on this subject, or whether the opinion above suggested, as to the effect of the earlier statutes, be or be not correct, remains to be decided whenever this important question shall be distinctly brought before the court.

In *Strype's Annals of Church and State*, under queen *Eliz. b. 2. p. 90.*, there is a letter, which was addressed to lord treasurer *Burghley* by a justice of peace for the county of *Somerset*, which shews that the great evils arising from habits of idleness amongst the poor, began then to be understood, and strengthens the idea that one great object of the legislative provisions for the poor made about that time, was to prevent able-bodied men from being unemployed. After observing upon the great increase of crime, and the number of wandering, idle vagabonds then committing depredations in that part of the country, the writer proceeds, "And when these lewd people are committed to the gaol, the poor country that is robbed by them are forced to feed them, which they grieve at. And this year there hath been disbursed to the relief of the prisoners in the gaol 73*l.*, and yet they allowed but 6*d.* a man weekly. And if they were not delivered at every quarter sessions, so much more would not serve, nor two such gaols would hold them. But if this money might be employed to build some houses adjoining to the gaol for them to work in, and every prisoner, committed for any cause, and not able to relieve himself, compelled to work, and as

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The King
against
COWLEY.

idleness, by which their habits and morals must soon be corrupted.

Case sent back to sessions.

many of them as are delivered upon their trials, either by the acquittal of the grand jury or petty jury, burning in the hand or whipping, presently transferred thence to the houses of correction to be kept in work, except some present will take any into service; I dare presume to say the tenth felony will not be committed that now is." This letter also shews that at that time prisoners committed for trial, although they could not be compelled, and were not willing to work, were in point of fact in some places supported at the expence of the public. It seems, however, that they could not legally claim to be so maintained. See the case of *The Justices of the North Riding of Yorkshire*, ante, 286.

PURDOM *against* BROCKRIDGE.

Where a prisoner is charged in execution, it is not sufficient for the plaintiff's attorney to file the committitur since in dan

A RULE was obtained for discharging the defendant out of custody, on the ground that the committitur on the judgment was not entered on the judgment roll within the time limited by the rule of court, made in *Easter* term, 41 G. 3. viz.: "that from and

case within five days next after the end of such term; and that in default thereof such prisoner or prisoners shall be entitled to be discharged." It appeared that a verdict was recovered by the plaintiff against the defendant at the *London* sittings before *Hilary* term last. In *Hilary* term he was rendered in discharge of his bail, and in *Easter* term charged in execution in this action, by rule of court, on an acknowledgment by the marshal that he was then in his custody. No committitur was entered on the judgment roll until after the end of *Trinity* term.

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 PURDON
 against
 BROCKRIDGE.

Rotch shewed cause upon an affidavit that the committitur piece was filed with the clerk of the docquets seven days before the end of *Easter* term, and contended that the plaintiff's attorney had thereby done all that he was bound to do. It was in consequence of the neglect of the clerk of the docquets, the officer of the court, that the committitur was not duly entered on the judgment-roll; the plaintiff, therefore, ought not to be prejudiced by that neglect.

Archbold contra contended, that although it was the duty of the clerk of the docquets to enter the committitur on the roll, yet the plaintiff's attorney was bound to see it done.

Per Curiam. This is not a case in which the court can exercise their discretion. It is clearly within the rule referred to, and the prisoner must be discharged.

Rule absolute.

1823.

KING'S BENCH PRISON.

Prisoners confined in the Marshalsea detected in playing at Hazard, punished by the Court.

THE Solicitor-General had obtained a rule for *James Stephens, Edward Corbet*, and several other persons, prisoners in the King's Bench prison, to be brought up to answer the matters of an affidavit; and also to shew cause why some of them should not be removed to some other prison. The rule was obtained upon the affidavit of the marshal and two of the turnkeys, in which it was stated that the former had received information that a gaming table was kept in one of the rooms of the prison, and that Hazard was generally played there from midnight till six o'clock in the morning, and that the two turnkeys detected the several persons named in the affidavit in the act of playing at dice about one o'clock in the morning of the 16th *November*, in the room of *Stephens*. The prisoners now being brought into court in the custody of the marshal, by virtue of the rule, the Court adjudged, that for the offence mentioned in the affidavit, *Stephens* should be confined alone in the strong

execution, was committed to the county gaol. In 1780, one *Richardson* had been ringleader of riots in the prison, and of an assault on one of the prisoners. On motion being made to remove him to the county gaol of the sheriff of *Surrey*, it was doubted whether the court could change the custody of a prisoner for a civil debt. The prison having been destroyed by fire in *June* that year, the matter dropped. In *Easter* term, 1782, a court of mayor and aldermen having been set up in the prison, and it being shewn upon affidavit that they had executed orders made at the court with great violence, the court ordered the prisoners to come up on a subsequent day, and shew cause why they should not be committed to the county gaol, or kept in close custody of the marshal. The late mayor, the present mayor, the four aldermen, the secretary, the two cryers, and the constable, having appeared in court, the court ordered the late mayor and secretary to be committed to the new prison till the fourth day of the ensuing term, and the then mayor to be confined in one of the strong rooms in the King's Bench prison, singly and by himself, for a fortnight, the two cryers to be confined in another strong room till the fourth day of term. In *Michaelmas* term, 1783, upon complaint upon affidavit of a riot by *Newell* and others in the lobby, calling themselves "liberty boys," after being called upon to answer the matters of the affidavit, two of them were ordered to be confined in the strong room for a fortnight.

1823.

KING'S BENCH
PRISON.RHODES *against* HAIGH and Another.

THIS was an action brought to try the right to a watercourse, and the mode of using a stream of water. By an order of nisi prius made at the Summer assizes, 1822, for the county of *York*, a verdict was taken for the plaintiff for 500*l.* damages and 40*s.* costs, subject to the award of *J. W.*, to whom all matters in difference between the parties were thereby referred, with power to order a nonsuit or a verdict for the defendant, and to regulate the future enjoyment, according to the rights of the parties. The plaintiff in the cause died on the 15th *December*, 1822, and the award was not made until the 5th day of *February*, 1823, a rule nisi for setting aside the award having been obtained, on the ground that made, it was held that his death determined the arbitrator's authority, and an award made subsequently was set aside.

Upon the trial of an action on the case relating to the right of using a stream of water, a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom all matters in difference were referred, with liberty to the arbitrator to regulate future enjoyment of the stream. One of the parties to the cause having died before any award was

the

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Ruons
against
Halon.

the death of the party before the award was a revocation of the submission. *Toussaint v. Hartop (a), Cooper v. Johnson. (b)*

R. Pollock now shewed cause. The death of one of the parties before the award was made was not a revocation of the arbitrator's authority, because here a verdict was taken at the trial for a certain sum, subject to the award of an arbitrator, and the sum afterwards awarded is to be taken as if it had been originally found by the jury. The plaintiff is then entitled to enter up judgment for the amount, without first applying to the court for leave to do so. The award is substituted for the verdict of the jury, and gives the party the benefit of the statute 17 Car. 2. c. 8., by which it is enacted, that "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." Here the judgment would have been entered in *Hilary* term, 1823; if the plaintiff had not obtained the present rule. Here, indeed, something besides the cause was referred, but the award, notwithstanding, will be good as far as it determines the

ment will not embrace, the arbitrator cannot proceed; and if he cannot proceed upon all the matters submitted, he cannot proceed upon any. That was decided in *Bower v. Taylor*, *Easter* term, 1816. Verdicts were taken in a replevin cause and in an action of assumpsit, subject to a reference, the costs of the causes to abide the event, and the costs of the reference to be in the arbitrator's discretion. *Taylor* died before the award made, but the arbitrator proceeded and ordered the verdict to be entered for the defendants in both causes, and plaintiff to pay the costs of the reference. A rule nisi was obtained to set aside the award, and it was urged, that the plaintiff might have wished to examine *Taylor*. *Abbott J.* observed, that upon affidavits that he so intended, it might have furnished a special ground for vacating the award; but the master having stated that the costs of the reference would be included in the judgment, the court held that the death did not prevent the arbitrator's proceeding. Rule discharged. *Holroyd J.* thought no submission by order of nisi prius revocable.]

ABBOTT C. J. This case falls within the principle laid down in *Bower v. Taylor*; for here all matters in difference are referred, and the arbitrator has a power to regulate the future enjoyment of the stream. The verdict and judgment would not embrace either of those matters. Since the decision of that case, it was held by this court, in *Cooper v. Johnson*, where the cause only had been referred, that the death of either party determined the arbitrator's authority. I am, therefore, clearly of opinion, that the rule for setting aside the award must be made absolute.

Rule absolute.

Littledale and *Alderson* were to have argued in support of the rule.

1823.

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RHODES
against
HAIGH:

1823.

HIGGINS *against* SARGENT, Esq. and Others.

In covenant upon a policy of insurance upon the life of *A.*, payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of *A.*

COVENANT upon a policy of assurance, bearing date the 10th *March*, 1819, by which the defendants covenanted to pay to the plaintiff 4000*l.* at the expiration of six months after due proof of the death of *R. C. Burton*. The cause was tried before *Bayley J.*, at the last assizes, for the county of *York*; and the principal question was, whether *R. C. Burton's* life was an insurable life at the time when the policy was effected. The learned Judge summed up the evidence to the jury with reference to that question, no point having been then made as to interest; but when the jury returned a general verdict for the plaintiff, his counsel then claimed to have interest allowed upon the principal sum insured, from the time when that sum became due. It was now stated in the affidavits that *R. C. Burton* died in *April*, 1821, and that due proof of his death was given to the defendants, so that the principal sum insured became due on the 6th *November*, 1822, and

titled to recover interest in all cases, from the time when a specific sum becomes payable; *Gordon v. Swan*. (a) There, copper was sold at so much per ton, payable at six months; and after argument, the court held, that the vendor was not entitled to interest from the expiration of the credit.

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 HIGGINS
 against
 SARGENT.

Scarlett and *D. F. Jones*, contra. In *Blaney v. Hendricks* (b) it was held, that interest is due on all liquidated sums from the time when the principal becomes due and payable. [*Abbott* C. J. That case has been long overruled.] The money in this case became due upon a specialty, and therefore ought to carry interest. It is true that interest is not due for rent in arrear, because the landlord has in his power the means of recovering his rent, viz. by distress and sale. But interest is due upon a specialty-debt, and also upon bills of exchange and promissory notes which are not specialties. If goods be sold to be paid for at the end of a month by a bill having two months to run, and a bill is not given, interest is due from the time of the expiration of the credit. And if so, why should not interest be payable if the contract were to pay the money at the same time as it would have been payable if a bill had been given.

ABBOTT C. J. It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should

(a) 12 *East*, 410.(b) 2 *Bl. Rep.* 761.

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HIGGINS
against
SARGENT.

be adhered to; and if we were to hold that interest was payable in this case, the application of the general rule might be brought into discussion in many others. Interest was not claimed by the plaintiff's counsel in this case until the Judge had concluded his address to the jury upon the principal question for their consideration, and they had pronounced their verdict upon that question in favour of the plaintiff. It was then contended for the first time, that the plaintiff was entitled to have interest allowed him upon the principal sum, secured by the policy, from the time when it had become payable; and that point was reserved by the learned Judge. The only question upon the present rule is, whether the jury ought to have been told that they were bound by law to give the plaintiff interest from that time; for if it was a matter for their discretion only, and it was not properly submitted to them, that may be a ground for granting a new trial, but not for increasing the damages. Inasmuch as the money recovered in this cause was not due by virtue of a mercantile instrument, and as there was no contract express or implied on the part of the defendant to pay interest, I cannot say that the jury ought to have been told that they were bound to give interest. That being so, this rule for increasing the damages must be discharged.

BAYLEY J. I am of the same opinion. It was once the opinion, that money lent carried interest, and in *Calton v. Bragg* (a) it was so contended, on the ground that the lender would otherwise, for the accommodation of the borrower, lose the benefit which he might make

(a) 15 *East*, 224.

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 HIGGINS
 against
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of his capital; and that the lender ought, in equity, to be put in the same situation as if he had applied his principal to his own use. But this Court held, that interest was not due by law for money lent without a contract for it expressed, or to be implied from the usage of trade or from special circumstances. Now, if interest be not due for money lent which is to be repaid either upon demand or at a given time, it follows, that it is not due for money payable within a certain time after due proof of the happening of a particular event. The circumstance of the money having become due in this case by virtue of a contract under seal, does not make any difference. If it were the intention of the parties that the principal sum should bear interest from the time when it became due, that might have been expressly provided for in the deed, but not having been done, the law will not imply a contract on the part of the defendants to pay interest; and, consequently, the jury ought not to have been directed to give interest.

HOLROYD J. I think that the Judge would not have been warranted in directing the jury to give interest in this case. It is clearly established by the later authorities, that unless interest be payable by the consent of the parties express, or implied from the usage of trade (as in the case of bills of exchange) or other circumstances, it is not due by common law. In *De Haviland v. Bowerbank* (b), Lord *Ellenborough* was of opinion, that where money of the plaintiff had come to the hands of the defendant, to establish a right to interest upon it, there should either be a specific agreement to that effect,

(a) 1 *Campb.* 50,

or

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or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used; and in *Gordon v. Swan* (a), the same noble and learned Judge said, that the giving of interest should be limited to bills of exchange, and such like instruments and agreements reserving interest. In the latter case, although the money was payable at a particular day, non-payment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now, in that action the defendant was summoned to render the debt, or shew cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the non-payment of the debt. Where, indeed, the interest becomes payable by virtue of a contract express or im-

by the common law is specifically applicable to his case, he could not have recovered interest, I think that he ought not to be permitted to recover interest by way of damages in an action of covenant. I cannot therefore say that the jury ought to have given interest in this case, and I doubt much whether the verdict could have been supported if they had done so.

Rule discharged.

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HICOURT
against
SARGENT

TAYLOR against WATERS.

THIS was a rule calling upon the plaintiff to shew cause why the outlawry should not be set aside for irregularity, and it was referred to the master to enquire and report, who, at the sittings after last *Trinity* term, reported as follows: "It appeared that the exigent issued 23d *March*, tested 12th *February* preceding, and returnable 17th *May*. Between the teste and return there were four days of exaction, 25th *February*, 4th *March*, 22d *April*, 6th *May*. It was objected that as the first two of these days were previous to the issuing of the writ, though within the period of teste and return, the proceedings were irregular; but I find that according to established usage and practice this is considered sufficient; there having been the proper number of exaction days between the teste and return, and the form of exaction being only general, and applicable to all causes without naming them. On the 30th *May* an allocatur exigent issued, tested the preceding 20th, and this 20th was also a general exaction day, making the quinto exactus, and, according to the practice, this seems also sufficient. But a more doubtful question

The third proclamation required by the 31 *Elix. c. 5.* must be made one month at the least before the quinto exactus. If it be not so made, the court will reverse the outlawry. *Quære*, Whether such reversal is for want of proclamation within the meaning of the 31 *Elix. c. 5.* or for irregularity.

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arises as to the proclamations. A writ of proclamation issued as the original exigent did, viz. 23d *March*, tested 12th *Feb.* preceding, and returnable 17th *May*, (which was regular,) and proclamations were made under it on 4th *April*, 15th *April*, (at the quarter sessions,) and the second of *May*. Now the statute 31 *Eliz. c. 3.*, directs, “that the sheriff shall make three proclamations in this form following, and not otherwise, namely, *one* in the open county court, *one other* at the general quarter sessions of the peace, and *one other* one month at the least before the quinto exactus.” If the expression *one other*, lastly used, is to be construed as the *third* or the last, then there has not been a month between that proclamation and the quinto exactus 20th *May*; and the outlawry is bad, but if the expression *one other* may refer to either of the former, then there has been a month, and the proceedings are sufficiently regular.”

Per Curiam. The *third* proclamation should have been made one month at the least before the quinto exactus; and as it appears that the proclamation was not duly made, the outlawry must be reversed, and being reversed for irregularity the defendant is not under the necessity of giving bail.

In *Michaelmas* term, the *Solicitor-General*, on behalf of the plaintiff, mentioned the case again, and insisted that he was entitled to have bail by the 31 *Eliz. c. 3. s. 3.*, which enacted “That before the reversing of any outlawry, through or by want of any proclamation to be had or made according to the form of that act, the defendant in the original action shall put in bail, not only to appear and answer to the plaintiff in

the former suit, in a new action, to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next, after the avoiding of the outlawry." Now, in this case, the outlawry is to be reversed for want of making proclamations according to the form of that act, and, therefore, by the very words of it, the defendant must put in bail.

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TAYLOR
against
WATERS.

Marryat contra. The outlawry is not in this case reversed for want of proclamations within the meaning of the 31 *Eliz. c. 3.* but for an irregularity in the proceedings. It appears by the report that the proper number of proclamations was made, but that one of them was irregularly made, this is not, therefore, a case in which bail can be required.

ABBOTT C. J. It appears to me that if the proclamation was not made according to the form prescribed by the statute, it was in law no proclamation at all. If it is to be considered in that point of view, then the outlawry must be reversed for want of proclamations; and the statute requires that in such cases bail shall be given. But if, as contended for the defendant, it was an irregularity in the proceedings, the Court may, in their discretion, order bail to be given on a reversal for such cause. Let the outlawry, therefore, be reversed, the defendant putting in special bail to the action in the common form.

Rule absolute on those terms. (a)

(a) Bail was accordingly given in the alternative, and not absolutely to satisfy the condemnation. From the mode of taking bail in this case, it would appear that the outlawry was reversed, not for want of proclamations,

1828.

TAYLOR
against
WATTS.

clamations, under the 31 Edw. c. 5., but for irregularity; for it does not appear that the Court can exercise any discretion as to the mode in which bail is to be given in the former case, the statute requires it to be given absolutely to satisfy the condemnation; and in this instance it was given in the form usually adopted, where bail is ordered by the court exercising the discretion vested in them by the 4 & 5 W. & M. c. 18. See *Sereold v. Hampson*, 2 Str. 1178. ; 12 East, 624. (a). *Matthews v. Gibbon*, 8 East, 527. *Hawlock v. Godden*, 12 East, 622. *Homer v. Wood*, 4 Taunt. 621. *Graham v. Grill*, 1 M. & S. 499. *Graham v. Henry*, 1 B. & A. 131.

END OF MICHAELMAS TERM.

Between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, FRANCIS LIND, and JOHN HUDSON MAY, Plaintiffs; and the Honourable CHARLES CECIL POPE JENKINSON, the Honourable HENRY KING, the Reverend JOHN MITCHEL, JOHN CUTHBERTSON, MARIA BARNARD, ALEXANDER HUME EVELYN, JOHN BYDE, GEORGE BARNARD, CHARLES MURTHWAITE, and HENRY WOODCOCK, Defendants.

And between GEORGE BARNARD, an Infant, by FREDERICK AUGUSTA BARNARD his Grandfather and next Friend, Plaintiff; and ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, MARIA BARNARD, FRANCIS LIND, JOHN HUDSON MAY, JOHN CUTHBERTSON, CHARLES MURTHWAITE, ALEXANDER EVELYN, JOHN BYDE, HENRY WOODCOCK, the Honourable CHARLES CECIL POPE JENKINSON, the Honourable HENRY KING, and the Reverend JOHN MITCHEL, Defendants.

And also between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, FRANCIS LIND, and JOHN HUDSON MAY, Plaintiffs; and the Honourable CHARLES CECIL COPE JENKINSON, and Sir HERBERT TAYLOR, Defendants.

And also between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife,

1824.

FRANCIS LIND, and JOHN HUDSON MAY,
Plaintiffs; and GEORGE IBTON MURTHWAITE,
and JANE CUTHBERTSON, Defendants. (a)

A., by will
duly executed
to pass real
estates, devised
and bequeathed
to trustees, and
to the survivors
and survivor of

THIS case was sent by the Lord Chancellor for the
opinion of this Court. *Thomas Murthwaite*, late
of *Smallberry Green*, within the parish of *Isleworth*, in
the

them, and the heirs, executors, and administrators of such survivor, all and every his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever and wheresoever, in trust to pay thereout the several legacies and annuities therein by him given and bequeathed, and for other purposes in the will mentioned. The testator then gave legacies and annuities to a considerable amount; and directed that the annuities should be chargeable upon his 26,400*l.* in the 3 per cent. consolidated annuities. It was stated in the case that a large surplus remained after paying debts, legacies, and annuities; but it was not stated that the legacies were actually paid, or that the annuitants were dead: After the legacies and annuities, the testator proceeded, "All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or entitled to, at the time of my decease, I do give, devise, and bequeath unto my three nieces, *E. M.*, *M. M.*, and *C. M.*, equally to be divided between them, share and share alike, for and during the term of their natural lives. And from and after the decease of them or either of them, it is my will that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits for life in like manner. And if either of my nieces shall happen to die in the lifetime of the others or other of them without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid, shall go to, and be shared and divided equally between, the survivors of my nieces for their respective lives, and afterwards by the lawful issue of the survivors of my nieces in like manner. And if all my nieces and their issue, save one, shall die without issue lawfully begotten, then such surviving niece shall have and enjoy the whole of the rents, &c. of such residue of my estate and effects for and during the term of her natural life. And from and after her decease, the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, &c. equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as personal, to and for his

the county of *Middlesex*, Esq., the testator hereinafter named, was, at the times of making his will and of his death, seised in fee-simple of freehold tenements, and seised in fee-simple of some copyhold tenements, which he duly surrendered to the use of his will; and was also possessed of several leasehold estates for years, and of other personal estate of different descriptions, to a very considerable amount. And the said *Thomas Murthwaite* duly made and executed his last will and testament, in writing, bearing date the 29th of *December*, 1806, and which was duly executed and attested, so as to pass freehold estates, and was as follows: "I give, devise, and bequeath to Mrs. *Margaret Murthwaite*, of *Twickenham*, in the county of *Middlesex*, widow, Mr. *John Cuthbertson*, of *Poland Street*, in the said county of *Middlesex*, and to Mr. *John Janes*, of the *Inner Temple*, *London*, gentleman, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every my freehold, copyhold, and leasehold estate, and my personal estate and effects whatsoever, and wheresoever situate, lying, and being, whether the same consists of mortgage, money in the public funds or stocks, bonds, notes of hand, or other securities, and all other my real and personal estate and effects of what nature or kind soever, not hereinafter by me specifically bequeathed, upon the trusts, and to and for the uses, ends, intents, and purposes hereinafter expressed, mentioned, and declared of and concerning the same; that is to say, in trust to pay thereout the several

1824.

MURTHWAITE
against
JENKINSON.

Held, first, that J. C., the surviving trustee, now has a fee-simple in the freehold estates, and an absolute interest the lease in hold.

Secondly, that the testator's three nieces took no legal estate under the will.

Thirdly, that G. B. took no estate under the will.

Fourthly, supposing that the will had commenced with the words "all the rents," &c., and the passage before those words had been omitted, the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

Fifthly, that G. B. would have no estate in the freehold or leasehold tenements; but should he survive the three nieces, and neither of them should have

any other child, he would be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the lifetime of the three nieces, he would die seised of no freehold, nor possessed of any leasehold estate.

1824.

MURTHWAITE
against
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legacies and annuities herein by me given and bequeathed, and for other the purposes in this my will mentioned." The testator then gave annuities to several persons for their respective lives, to the amount of 440*l.* per annum and proceeded: "All which beforementioned annuities I hereby will, order, and direct, shall be chargeable upon and payable out of my twenty-six thousand and four hundred pounds three per cent. consolidated bank annuities, or such sum as may be standing in that fund in my name at the time of my decease." The will then contained bequests of legacies to a considerable amount, and then was as follows: "All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or in any way entitled unto at the time of my decease, I do hereby give, devise, and bequeath unto my three nieces, *Elizabeth Murthwaite*, *Maria Murthwaite*, and *Charlotte Murthwaite*, daughters of my late brother, the Reverend *Peter Murthwaite*, late of *Ipsden*, in *Oxfordshire*, equally to be divided between them, share and share alike, for and during the term of their respective natural lives; subject, nevertheless, to such provision as is hereinafter provided touching and concerning the house and premises now in my occupation. And from and after the decease of them, or either of them, it is my will and meaning, that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits, for life, in like manner; and it is my further will and meaning, that

that if either of my said nieces shall happen to die in the lifetime of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid, shall go to and be shared and divided equally between the survivors of my said nieces for their respective lives, and afterwards by the lawful issue of the survivors of my said nieces in like manner. And if all my said nieces and their issue, save one, shall die without issue lawfully begotten, then it is my will and meaning, that such surviving niece shall have and enjoy the whole of the rents, issues, dividends, interest, and profits of such residue and remainder of my estate and effects for and during the term of her natural life; and from and after her decease, it is my further will and meaning, and I do hereby will, order, and direct, that the lawful issue of such surviving niece, (if more than one,) shall have and enjoy the whole of the rents, issues, dividends, interest, and profits of all such residue of my estate and effects, equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and to hold so much and such part and parts thereof as are freehold to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint tenants; and if but one, then to such only one, his or her heirs and assigns for ever; and to hold so much and such parts thereof as is and are copyhold, at the will of the lord or lords, lady or ladies of the manor or manors of which the same are holden in like manner. And if all my said nieces shall die without issue, then from and

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after the decease of the survivor of them my said nieces without issue as aforesaid, I do hereby give, devise, and bequeath the whole of such residue and remainder of my estate and effects, as well real as personal, and as well freehold as copyhold, to my next male heir of the name of *Murthwaite*, to hold to such male heir, his heirs, executors, and administrators in manner aforesaid." The testator then, after reciting that his house was leasehold, and that the said *Margaret Murthwaite* and his three nieces might not choose to live together, or to occupy his house, devised the same to them or such of them as should be living at his decease; but if it should happen that they did not agree to live together, he directed that the house and furniture should be sold, and disposed of by the trustees thereinbefore named, or the survivors; and that the money to arise by such sale should be divided equally amongst the said *Margaret Murthwaite* and his said three nieces, or such of them as should be living at the time of his decease, and the lawful issue of them as should be dead, if any, for their use and benefit. Then followed clauses appointing executors, and relating to other matters not important to this case.

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John Janes proved the said will of the said testator. *Maria Barnard*, then *Maria Murthwaite*, some time in the year 1809 intermarried with *George Barnard*, but who departed this life on the 5th day of *October*, 1817, leaving *Maria*, his wife, surviving; and there was issue of the said marriage between them only one child, viz. *George Barnard*. *John Janes*, one of the executors and trustees of the said testator, died in the year 1814, leaving *Margaret Murthwaite* and *John Cuthbertson*, his co-trustees and co-executors, him surviving; and the said *Margaret Murthwaite* died some time in the year 1816, intestate, leaving the said *John Cuthbertson*, and also her said daughters, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte Macpherson* surviving her. A very large surplus of the testator's personal estate and effects remains after paying his funeral and testamentary expenses, and his debts, and the legacies and annuities bequeathed by him. The defendant *George Irton Murthwaite* would now be the next male heir of the said testator, of the name of *Murthwaite*, in case the said *Elizabeth Murthwaite*, *Charlotte Macpherson*, and *Maria Barnard* were now dead without leaving issue. The questions for the consideration of the Court are,

First, what estate and interest the said *John Cuthbertson*, the surviving trustee, now has under the said will of the said testator, in the freehold and leasehold tenements respectively devised and bequeathed unto the said *Margaret Murthwaite*, *John Cuthbertson*, and *John Janes*, as aforesaid.

Secondly, what estates the said testator's said three nieces, *Elizabeth Murthwaite*, *Maria Barnard*, and *Char-*

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Thirdly, whether the said *George Barnard* now has any and what estate in the said freehold and leasehold tenements respectively, and what estate he will have in the said freehold and leasehold tenements respectively, in case he shall be the only issue of the said three nieces living at the death of the survivor of them, no other issue having been born; and in case the said *George Barnard* should now die, in the lifetime of the said three nieces of the said testator, what estate would he die seised and possessed of in the said freehold and leasehold tenements respectively.

And in case the Court shall be of opinion, that by the will, as above stated, the whole legal estate in fee-simple, in the said freehold tenements, and the absolute interest in the said leasehold tenements, is now vested in *John Cuthbertson*; then, in case the will had commenced with these words, "all the rents, &c." and the passage before these words had been omitted,

Fourthly, what estate the said testator's three nieces, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte*

no other issue having been born ; and in case the said *George Barnard* should now die, in the lifetime of the said three nieces of the said testator, what estate would he die seised and possessed of in the said freehold and leasehold tenements respectively.

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This case was argued in the course of the last term, by

Tindal, for *Elizabeth Murthwaite*, *John Macpherson* and *Charlotte* his wife. To the first question proposed, the Court must answer, that *John Cuthbertson*, the surviving trustee, hath not now any estate under the will of the testator ; to the second, that the three nieces took legal estates in tail, with cross-remainders in tail, in the freehold, and absolute estates in the leasehold ; to the third, that *George Barnard* has not now any estate in the said freehold and leasehold tenements, or either of them ; but, if he survives his mother and aunts, they having had no other issue, or leaving no other issue, he will take an estate tail in the whole freehold by descent from his mother. If this view of the case be correct, the other questions do not arise. The material clauses of the will are, first, the devise to the trustees ; secondly, the charge of the legacies and annuities on the stock ; thirdly, the devise to the nieces, and the provisions for different cases of survivorship ; and, lastly, the ultimate remainder over, on failure of issue of the nieces generally. In deciding the first question, the Court must not confine themselves to the clause devising to the trustees. The words of that clause are certainly large enough to comprehend the whole property, both real and personal ; but looking at the whole will, it is plain that the devise to the trustees was merely for the payment of debts and legacies ;

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cies; and that the testator intended the personal property to be first applied to those purposes, and that the real estate should not be so applied if that were unnecessary. The annuities are expressly made chargeable in the first instance on the stock; the direction to the trustees is, to pay the legacies and annuities out of the funds left to them. There is no direction for them to sell, or convert into money, any part of the real estate, nor in the devise of the residue does the testator mention it as property already given to the trustees. He gives it directly to his nieces, and does not provide that the trustees shall hold in trust for them. There is no devise to the use of the trustees, and therefore nothing to prevent the use being executed in the persons beneficially entitled, after payment of the debts and legacies. It must therefore be inferred, that the testator intended to devise the real property to the trustees, only in case the personal should prove insufficient; and if a devise to that effect would be good if express, it may also be good when implied. The Court will not allow the trustees to take more than, or beyond what, is sufficient for the purposes of the trust. *Doe dem. Player v. Nicholls.* (a) Here it is found, that a large surplus of the testator's

testator's nieces take estates in tail. It should be premised, that the devise to them is sufficient to carry the lands and funds, although it does not do so in terms, for an indefinite devise of rents will pass the land itself; and it is equally well established, that an indefinite bequest of dividends, interest, or produce, will pass the capital. *Page v. Leapingwell* (a), *Stretch v. Watkins* (b), *Earl of Chatham v. Daw* (c), *Butterfield v. Butterfield*. (d) The residuary devise is therefore the same in its result as if the lands and effects had been given, and not merely the rents and dividends. As to the main point, it must be admitted on the other side, that express estates for life are given to the testator's three nieces; and that the ultimate remainder over is not given until after an indefinite failure of the issue of the nieces. The prevailing intention, therefore, appears to have been, that the estate should not pass from the families of the first takers until an indefinite failure of their issue; and the Court must give effect to the main intent, although by so doing they may defeat some minor intent. It is a general rule of law, that if a testator gives an estate to the first taker, whether for life, or uses words which shew an intention that he should take a fee, yet if there be also an intention expressed that the estate shall go over on a general failure of issue of the first taker, and not until there has been a complete failure, the first taker shall have an estate tail. This rule is so strong that it prevails, even where the issue of the first taker are named to take as tenants in common, or as joint tenants, or

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(a) 18 *Vcs.* 463.(b) 1 *Madd.* 253.(c) 6 *Br. P. C.* 450.(d) 1 *Vcs. sen.* 153.

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are named by name; and it is also expressed, that the issue of that issue shall inherit. Let us look to the words of the will; upon them it will appear that the predominant intention was, that the estate should not go over until all the issue of the nieces were extinct; and if that be so, then in order to effectuate that, any conflicting intention must be sacrificed. The testator first gives the estate to his nieces, "equally to be divided between them, share and share alike, for and during the term of their respective natural lives." If the devise had stopped there, the nieces would undoubtedly have taken an estate for life only; but coupling that clause with the ultimate remainder over, omitting the intermediate clauses, it becomes clear that they must take an estate tail. The difficulty in the case arises from those intermediate clauses. The proposition on the other side must be, that the nieces take only for life, with contingent remainders either for life or in tail to their issue; but there are greater difficulties in the way of that construction than the other which has been proposed. After the devise to the nieces, the testator proceeds, "After the death of them, or either of them, the lawful issue of them and each of them shall have and enjoy

ever must be relied on; but that would rather give an estate of inheritance to the nieces, for the estate is to go over on failure of *their* issue. There is no devise to the issue of the issue, or any thing to give them, an estate tail by implication. In order to give the children an estate tail, the words "for life in like manner" must be strack out; but if that can be done to effect the general intent of the testator, why may not the words "for life" in the devise to the nieces, and the whole clause devising to the issue of the nieces for life, be erased? Perhaps the testator intended to give a life estate to the several generations in succession, but the law prevents him from carrying that object into effect. Then comes the clause providing for cross-remainders, in the event of the death of one niece; that shews that the nieces were the objects of the testator's bounty, the termini a quibus the estate was to descend. The words "issue of the body lawfully begotten," in that clause, cannot, as words of purchase, point to children living at the death of the niece, but must be used as words of limitation; for, supposing one of the nieces to have a child, and that child to die in its mother's lifetime leaving a child, the latter would take nothing by such a construction; and so the prevailing intention of the testator would be defeated. The other side, therefore, must contend that the children of the nieces take an estate tail; they, therefore, are driven to reject the words "for life in like manner." But, if "issue" is to have an indefinite sense in this clause, why should it not in the former? If they do not reject those words, then the ultimate remainder over is the only clause to which they can resort as giving an estate tail to the children of the nieces; but

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but the failure of issue, whereupon that remainder is to take effect, being referred not to the issue of the nieces, but to the nieces themselves, conclusively shews that the estate tail is given to the nieces. *Wight v. Leigh.* (a) The testator clearly intended that all the descendants of the nieces should take; and in order to effect that, they must have an estate tail by implication. (b) The testator next provides for the event of the death of two nieces; the words "save one" in that clause must be transposed to make sense of it, and then it will run thus, "If all my nieces, save one, and their issue shall die," &c. It would seem as if the testator intended, that the surviving niece should take for life, and the issue in fee; the latter, however, is cut down to an estate tail by the remainder over. (c) In that clause the word "issue" must be construed "indefinite descendants," or the argument as to the exclusion of a grandchild would be applicable to this as well as to the former clause, and the estate would go over before the complete failure of issue of the nieces, contrary to the testator's intention. [*Bayley J.* It may perhaps be argued, that he intended to devise to the nieces for life, remainder to their children for life, as tenants in common, remainder to the issue of the sur-

remainder over. That can have but one meaning; that the whole estate should go over on the indefinite failure of issue of the testator's nieces, and not till then. Such is the prevailing and paramount object of the testator; and that, according to a series of decisions, is to be carried into effect at the expence of any particular intention that may be inconsistent with it. The rule of law upon this point was settled by *Robinson v. Robinson* (a); and that case was recognised and confirmed in *Doe v. Applin* (b), which is a very important authority in favour of the nieces of the testator in this case. The devise, there, was, "to *W. Dimmock*, to hold to him during his natural life, and after his decease, to and amongst his issue, and in default of issue, over;" and the Court held that *W. Dimmock* took an estate tail. That case gets rid of any difficulty arising from the restriction of the estate given to the nieces, or from the direction that their issue shall after their decease enjoy it *in like manner*, i. e. share and share alike; for, in *Doe v. Applin*, it was urged that the issue must take as purchasers, because the estate was given *amongst* them, but the court held that the argument was not strong enough to prevent them from giving effect to the general intent of the testator. *Doe v. Smith* (c) is also a strong authority for the same position. The devise was, "to *M. Ascough* and the heirs of her body lawfully to be begotten, for ever, as tenants in common, and not as joint-tenants; and in case *M. A.* shall happen to die before twenty-one, or without leaving issue on her body lawfully begotten, then over." Lord *Kenyon* in his judgment says, "I ad-

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(a) 1 Burr. 38.

(b) 4 T. R. 82.

(c) 7 T. R. 531.

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mit, that in this case the testator intended that his daughter *M. Ascough* should only take an estate for life, and that her children should take as purchasers, but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations; now, the latter intention cannot be carried into effect unless *M. A.* takes an estate tail." So also in *Doe v. Cooper* (a) it was held, that under a devise "to *R. Cock* for the term only of his natural life, and after his death to his lawful issue as tenants in common," *R. C.* took an estate tail in order to effectuate the general intent. The case of *Show v. Weigh* comes very near the present; the devise was, "to trustees in trust for the testator's two sisters, equally between them, during their natural lives, without committing any manner of waste; and if either of his sisters should happen to die, leaving issue or issues of her or their bodies lawfully begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it should happen that both the sisters should die without issue as aforesaid, and their issue or issues to die without issue or issues lawfully to be begotten, then over." The case came first before the court of great sessions in *Wales*, where it was held that the testator's sisters, the first takers, had an estate tail, with cross-remainders in tail. This Court was at first of the same opinion, but they afterwards decided that it was only an estate for life (b); that judgment, however, was reversed by the House of Lords, and the judgment

(a) 1 *East*, 229.(b) 2 *Str.* 798.

of the court of great sessions established. (a) That case is extremely like the present; the provision was there, "for the issue to take the mother's share," and yet "issue" was held not to mean children only. There, too, the provision, that the sisters' estate should be without impeachment of waste, clearly shewed that the testator thought he had not given, and did not intend to give, them any thing more than an estate for life; yet that particular intent was sacrificed to the paramount intent, that the estate should not go over until an entire failure of the descendants of his sisters. [*Bayley* J. In *Ginger v. White* (b), *Willes* C. J. says, that *Shaw v. Weigh* is not a case of any great authority.] The doctrine there laid down is recognised and confirmed in a variety of other cases, *Doe v. Halley* (c), *Wight v. Leigh* (d), *Barlow v. Salter* (e), *Bennett v. Lord Tankerville*. (f) With respect to the leasehold tenements, the law appears perfectly clear. Formerly an opinion prevailed, that where freehold and leasehold property were devised by the same clause, the first taker of an express estate tail took an absolute estate in the leasehold, but not where the estate of inheritance was given by implication. *Atkinson v. Hutchinson*. (g) That doctrine is now exploded; and it is a settled rule, that the first taker of an estate tail, whether it be given expressly or by implication, takes an absolute estate in the leasehold. *Daw v. Lord Chatham* (h), *Chandless v. Price* (i), *Crooke v. De Vandes*. (k) If these

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(a) *Fitzg.* 7. 3 Br. P. C.

(c) 8 T. R. 5.

(e) 17 Ves. 479.

(g) 3 P. W. 258.

(i) 3 Ves. 99.

(b) *Willes*, 348.

(d) 15 Ves. 564.

(f) 19 Ves. 170.

(h) 6 Br. P. C. 450.

(k) 9 Ves. 197.

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Campbell, for *Maria Barnard*, confined himself to the question, what estate was taken by the nieces in the freehold tenements — and he contended that they took an estate tail. The difficulty in construing this will arises from the words “for life” being introduced into the devise to the issue. But for these words there would have been a clear estate tail in the nieces; for no rule is better established than that, if there be a devise to *A.* for life, remainder to his issue, and if he die without issue, over; — however strong the intention may be expressed that *A.*’s estate shall be for life and no longer, *A.* shall take an estate tail, to effectuate the general intent of the testator, that the ultimate devisee shall take nothing while any descendants of *A.* remain. Here it evidently was the intent of the testator, that no part of his estates should go over to his next male heir of the name of *Murthwaite*, till after a general failure of the issue of his nieces. The devise being in words “for life,” both to the nieces and to their issue, the only

to shew that the testator meant that there should be an estate tail in the issue more than in the nieces? There are no words of inheritance annexed to the estate given to the issue; and, on the contrary, an estate for life is expressly given to them. The words "for life" must be supposed to have been used by the testator, not to describe the quantity of the estate which he gave, but as conveying an unnecessary intimation of the length of time for which each generation was to enjoy the property. But where such words are inconsistent with an estate clearly given, they are rejected as repugnant, as in *Doe d. Cotton v. Stenlake (a)*, where there was a devise to the testator's daughter, *P.*, and her heirs *during their lives*, she having two children then born; and it was held, that she took an estate of inheritance, Lord *Ellenborough* C. J. observing that "the words *during their lives*, after the devise to the daughter and *her heirs*, was merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property." It is always to be remembered, that the devise over here is on failure of the issue of the nieces, not on failure of the issue of their children. The nieces are the *stirpes* of the issue, upon an indefinite failure of whom the ultimate devisee is to take; and there has never yet been a case in which an estate tail has been given by implication on account of a devise over on failure of issue, that this estate tail has not been given to the *stirpes* from which such issue was to spring; and upon such a subject it must be much more salutary to proceed upon a broad established principle, than to

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(a) 12 *East*, 515.

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introduce new subtleties and distinctions. The words in the devise to the issue, that "each of them should have and enjoy *his* or *her* mother's share," strengthens the presumption, that the testator used "issue" as a word of limitation; for if he had meant that all the children of each niece should take, he would have said, that they should have and enjoy *their* mother's share. Issue is *prima facie* a word of limitation; and the onus lies upon those who contend that it is used as a word of purchase, to shew a clear intent to that effect from some other part of the will. "For life" must here be insufficient, these words being inconsistent with the estate of inheritance insisted upon by the other side, who are driven to contend, that the word *issue* is used by the testator in two different senses; first for *children*, and then for the whole *progeny* of the nieces. It may be said, that the testator probably wished to defer the power of alienation as long as possible, and that therefore he would prefer giving an estate tail to the children instead of the nieces. The consequence of effectuating the testator's general instead of his particular intent in these cases, certainly is, that the first taker is enabled to, and generally does, defeat both the general and particular intent, by gaining to him-

the devise over should not take effect, except upon an indefinite failure of issue. In addition to the authorities already adduced on this point, may be cited, *Pierson v. Vickers* (a), where there was a devise to *A.*, and the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common, and not as joint tenants*, and in default of such issue over, and this was held an estate tail in *A.* In two cases a different construction was put upon similar devises in this court; but both these cases have been overturned. In *Doe v. Goff* (b) the devise was to *M.*, and the heirs of her body, *as tenants in common, and not as joint tenants*, but if such issue should die before he, she, or they respectively attain the age of twenty-one, then over; and it was held, that *M.* took only an estate for life, and that the children took by purchase estates tail as tenants in common. But this case was denied to be law, both by the present Lord Chancellor and by Lord *Redesdale*, in the case of *Doe d. Wright v. Jesson*. (c) There the devise was to *W.* for life, with a power of appointment to the heirs of his body, and for want of such appointment to the heirs of the body of *W.*, share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue, over. The Court of King's Bench (d) held that *W.* took only an estate for life; but the judgment of this court was reversed in the House of Lords; and the danger was pointed out of departing, on account of particular expressions in a will, from the established rule, that the ancestor shall take an estate tail where an estate is given

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(a) 5 *East*, 548.(b) 11 *East* 668.(c) 2 *Bligh. P.C.* 1.(d) 5 *M. & S.* 95.

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to him expressly for life, remainder to his issue or the heirs of his body, and for default of such issue to an ultimate devisee. The noble Lords who decided that case rather discountenance the distinction between general and particular intent, and consider that when words are found in a will, inconsistent with the chief object of the testator, they are to be considered as not used by him in their technical sense. Suppose, therefore, that this testator, in the devise to the issue, does not mean by the words "for life," to express the quantity of estate he means to give, and all difficulty vanishes in construing the will. If the nieces, on the contrary, are held only to take estates for life, the greatest perplexity will arise in determining what estates would be taken by their issue, upon the different suppositions which might easily be made of the state of the family.

Littledale for *G. Barnard*. The surviving trustee now has an estate in fee-simple in the freehold, and an absolute estate in the leasehold tenements. If that be not so, then the nieces have estates for life, with remainder to their issue, as purchasers in tail as tenants in common, and *G. Barnard* has a vested remainder in tail in one-third, liable to be divested or opened upon the birth of other children of his mother, with a contingent remainder in tail in the shares of his aunts; and if he should be the only issue of the nieces living at the death of the survivor, he will have an estate tail in the whole of the freehold, and an absolute estate in the leasehold. Nothing is more clear than the answer to be given to the first question. It is true that the annuities are charged on the different personal securities, and it

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is found that the personal property is sufficient to pay the debts and legacies, but till they are actually satisfied (and that cannot be done while any of the annuitants are living), the personal property may fail, and it may be necessary to resort to the realty. As to the other and main question, it must be admitted that in construing wills, the intention of the testator must be observed, and that if there be a general intent inconsistent with any particular one, the latter must be sacrificed. But both must be preserved where that is practicable. In this case it appears that the testator had several objects in view. First, that his nieces should take an estate for life. Secondly, that their issue should take for life. Thirdly, that the issue of the surviving niece should take in tail; for although the words are sufficient to convey a fee, yet the remainder over shews that an estate tail was intended. And lastly, which is perhaps the paramount intent, that the estate should go over on a complete failure of the issue of his nieces. That intent must at all events be preserved; but the Court should also take care to preserve as many of the particular intents as they can consistently with the other object. Now the preservation of the first particular intent, viz. giving the nieces an estate for life, will not defeat the general intent, but the second would; for although an estate for life may be given to an unborn child, yet no remainder can be engrafted upon it. If, therefore, the issue of the nieces take an estate for life, the remainder over is destroyed. But the first, and also the third intent, viz. that the issue of the surviving niece shall take an estate tail, may be preserved consistently with the general intent; and the only alteration to be made in the testator's disposition of his property,

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is to enlarge the estate given to the children of the nieces.

By the construction contended for on the other side, the estate of the nieces is enlarged, and the remainder for life expressly given to their issue, as tenants in common, and the remainder in tail to the issue of the surviving niece are altogether destroyed; whereas by the other interpretation, only one particular intent is destroyed, and the case of *Humberston v. Humberston* (a) shews that it will be destroyed in such a manner as the rules of law require; for it will give an estate tail to the issue unborn, which they ought to take according to the general rule. Thus, then, the several devises will be preserved most nearly according to the testator's wish. [*Bayley J.* If the nieces have several children, how will they take?"] As tenants in common. [*Bayley J.* Then you must contend, that the words "for life in like manner" are operative to shew the intention of the testator, but ineffectual to perform it.] That certainly is so. The construction now proposed will not defeat the main intention, it will preserve both the remainder to the surviving niece and her issue, and to the next heir male of the name of *Murthwaite*. The whole estate will still go over together; for there will be cross-remainders in tail between the issue. The will creates cross-remainders between them as to the estate for life, and if that estate be enlarged to an estate tail, there will be the same cross-remainders as to that estate, as there otherwise would have been as to the estate for life. With respect to the clause devising to the surviving niece and her issue; it is clear that the "issue" there are to take as purchasers, for the devise is "to the issue and their heirs," as to

(a) 1 P. W. 352.

nants in common. [*Bayley J.* Suppose the surviving niece to have died without issue, and that another had before died, leaving issue, would the clause to which you now refer give an estate-tail to the issue of the latter? Is there any case deciding that the expression, "if *A.* die without issue," can give an estate tail to a third person?] The question of *G. Barnard* taking an estate tail or not cannot depend on the contingency of the nieces dying in any particular order. Supposing his mother to live longest an express estate tail is given, the same effect must, therefore, be extended by implication to the death of the nieces in any other order. [*Abbott C. J.* That still leaves the question open, whether *G. B.* takes by purchase or by descent.] If the issue take only for life the devisee over cannot take at all; they must, therefore, have an estate tail to effectuate the general intent of the devisor. There is nothing to shew that the nieces were to take an estate of inheritance. There is not any case which establishes, that where an estate for life is expressly given to the first taker, and also to the second, the first taker can have an estate tail. Thus, in *White v. Collins (a)*, the devise was to "*F. M.* for life, remainder to the heir male of his body for life, and for want of such heir male, over;" and it was held, that *F. M.* took only for life. [*Bayley J.* That case decided that the heir male took only for life,] In this part of the will the testator provides for the death of all the nieces and their issue, save one, without issue; the issue are the persons whose death without issue is there contemplated; that word is, therefore, used as a word of purchase. In the same clause the testator says, that the issue of the surviving niece shall have and enjoy the

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(a) 1 Com. 289.

personalty;

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personalty; but if the nieces took an estate tail, they would have an absolute interest in the personalty, and the devise of it to the issue would be entirely defeated. *Doe v. Applin* cited on the other side is very distinguishable; there the general intent could not have been carried into effect without holding that the first taker had an estate of inheritance, and the same observation applies to *Doe v. Cooper* and *Doe v. Smith*. In the latter Lord Kenyon observes, that there were no words of limitation added to the estate given to the children, and yet that the remainder over was not to take effect until there was a general failure of issue. Here the remainder to the issue of the surviving niece is on the death of the other nieces and their issue without issue, which makes this case altogether different from *Doe v. Smith*. *Doe v. Jesson* is distinguishable in a variety of particulars. There the devise was "to A. for life, and after his decease to the heirs of his body." Here, it is to the nieces for life, and then to their issue, which is frequently used as a word of purchase, whereas the other expression can very rarely, if ever, receive that construction. Again, here there is an express estate for life, given to issue of the nieces, but there was no such restriction of the estate given to

White v. White (a), and *Goodtitle dem. Cross v. Woodall* (c) are also authorities to shew, that the first takers in this instance had nothing more than a life estate. It may be said, that the construction now contended for requires that the word "issue" should be used in two senses in different parts of the will. That, indeed, may be done, if necessary, to effectuate the testator's intention; but here it is not absolutely necessary; for although in the first place it means the children of the nieces, and in the second the children together with their descendants, yet in the former place it means the children, as the *stirpes* whence issue were to descend; they, therefore, are part of the issue afterwards contemplated, and the word cannot be justly said to be used in two different senses. Upon the whole there cannot be any doubt that the testator intended to give his nieces an estate for life only, and if that be manifest the Court must say, that *G. Barnard* has now a vested estate tail in remainder in one-third of the freehold, liable, indeed, to be affected by future circumstances, and a contingent estate tail in the residue. As to the leaseholds, if the nieces took only estates for life in the freehold, they will take no more in the leasehold; but even if the nieces took estates tail in the freehold, they will take only estates for life in the leasehold, and the issue of the nieces will take the residue of the leasehold by way of executory limitation.

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Parke, for *George Irton Murthwaite*, the person who would be the next heir male of the testator, of the name of *Murthwaite*, in the event of the nieces dying without issue. The interest of this party is certainly rather re-

(a) *Willes*, 348.(b) *Ib.* 592.

mote,

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sett, but if the nieces take only life estates, and *G. Bernard* should die under twenty-one years of age, the remainder in fee would be vested in him. The argument, therefore, for *G. Bernard*, applies to his case also, and he must seek to have the same answers returned to the questions proposed that have been pointed out on behalf of the former. [*Abbott C. J.* We are not informed by the case whether the fund upon which the legacies and annuities are charged really exists. It is impossible for us to give a satisfactory answer to the first question, unless we know that, and also whether the debts and legacies are paid. *Bayley J.* We do not even know whether all or any of the annuitants are living]. Perhaps it is unnecessary to enquire into that, for if the testator intended that the trustees should take the estate, that must decide the question. [*Abbott C. J.* He might intend them to take an estate, *quousque*]. Although there may not be any great probability that the realty will be wanted for the payment of the annuitants, yet still they have a right to that security. Besides, according to the construction contended for by *G. Bernard* and *G. I. Murthwaite*, there are contingent remainders: it is therefore necessary that there should

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that is to be carried into effect with the least sacrifice of particular intent? It has been already shewn, that that will be done by holding that the nieces have an estate for life only. In every part of the will in which they are mentioned they are spoken of as taking for life. It is clear also, upon the words of the will, that the issue of the nieces were intended to take for life; and the issue of the surviving niece in fee, as tenants in common, although the remainder over reduces that to an estate tail. If an estate tail be given to the nieces, every one of those objects is defeated; whereas, if they take for life, and the issue in tail, the only alteration is by enlarging the estate of the latter. Issue, in the first part of the devise, means children. It is often used as a word of purchase, and in *Roe v. Grew* (a) *Clive J.* says: "The word *issue* is one of the most vexed words in the books; sometimes it is nomen singulare, sometimes plural, sometimes a word of limitation, sometimes of purchase; but it must always be construed according to the intent of the will or deed wherein it is used." No case can be found where "issue" has been held to be a word of limitation, when coupled with such terms as are used in this will. The testator says that the issue shall take for life, in like manner as the nieces, *i. e.* as tenants in common. The words *for life* clearly shew the intention, that they should take as purchasers, although those words cannot be operative in limiting the quantity of estate given; and, therefore, although they are rejected as a measure of the estate, yet the will cannot be construed as if they had never been inserted, for they are still to be looked at as explaining the meaning of the testator, to which, if possible, effect must be given. Then he after-

(a) 2 *Wils.* 322. See a better report in *Wilmot's Opinions*, 272.

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wards gives an estate tail to the issue of the surviving niece, in the event of two dying without issue; but as the testator wished the issue of each niece, if any, to take some estate as purchasers, and as in the event just mentioned, the estate given to the issue of the other is declared to be an estate tail; a similar estate must, by implication, be given to the issue of all the nieces, if they should have any. In *Ginger v. White*, *Willes C. J.* lays it down as a general rule of construction, that a precedent estate, devised by express words, cannot be lessened, increased, or altered by implication, although it may by express words, and he cited the case of *Popham v. Bamfield*, where the devise was "to *P.* for life, remainder to his first and other sons successively in tail male, and for want of issue male of *P.* remainder over;" and it was held that *P.* took a life estate only. Now the expression, "for want of issue male of *P.*," in that case exactly corresponds with "if all my nieces shall die without issue" here in the clause giving the remainder over, that therefore is insufficient to enlarge the estate for life, expressly given to the nieces; and according to *Willes C. J.* in that case a distinction was made between a devise "to *A.* for life, and if he die without issue over," with-

Stafford v. Buckley (a), *Harris v. Bishop of Lincoln* (b),
Sheffield v. Lord Orrery. (c)

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Tindal, in reply. Enough appears on the case to shew that it is not necessary for the trustees to take the real estate for the purposes of will. As to the main question there is no case to justify the construction contended for on the other side; for wherever the devise over on failure of issue applies to the first takers, they must take an estate of inheritance. Without resorting to the devise over, there is nothing more than a life estate given first to the nieces, then to their children. But it is contended that the clause providing for the death of all the nieces, save one, without issue, by implication gives an estate tail to the issue of all the nieces. That, however, cannot be the effect of it, unless two different meanings be given to the word *issue* in the same sentence, which would be contrary to *Doe v. Applin*. [*Best J.* The context may shew clearly that the testator meant to put two different senses upon the same word.] Even supposing that it could be so construed, still, in order to effectuate the principal object of the testator, that the whole estate should go over together, there must be cross remainders between the families of all the children of the nieces; but there are no words from which cross remainders can be implied between the families derived from the different children, as *stirpes*. And therefore the estate might, if that construction were adopted, go over in parcels; whereas, according to the other construction, the families of the nieces would enjoy the estate to the exclusion

(a) 2 *Ves. sen.* 171.(b) 2 *P. W.* 135.(c) 3 *Atk.* 282.

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of the devisee over, which was the testator's wish, for the nieces were the objects of his bounty.

The following certificate was afterwards sent :

This case has been argued before us, and we are of opinion,

First, that *John Cuthbertson*, the surviving trustee, now has a fee-simple in the freehold estates, and an absolute interest in the leasehold estates, given by the will of the testator to him, *Margaret Murthwaite*, and *John Janes*.

Secondly, that the testator's three nieces took no legal estate under this will.

Thirdly, that *George Barnard* took no estate under this will.

Fourthly, that in case the will had commenced with the words, "all the rents, &c.," and the passage before those words had been omitted, that the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

Fifthly, that *George Barnard* would now have no estate in the freehold or leasehold tenements. But should he survive the three nieces, and neither of them

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THIS was a case sent for the opinion of this Court by the Lord Chancellor. It arose out of a petition by *Samuel Enderby*, praying, amongst other things, that the commissioners acting under a commission of bankruptcy against *William Gilpin*, might be directed to keep distinct accounts of the estate and effects of the copartnership hereinafter mentioned, and that the assignees and commissioners might be directed to apply the same in discharge of the outstanding debts of the copartnership then remaining unsatisfied, or pay over the same to the petitioner, for the purpose of making such application, and that he might be at liberty to prove, under the commission, a sum of 15,902*l.* 19*s.* 8*d.* *William Gilpin*, the bankrupt, in and previously to the month of *September*, 1807, carried on trade as a general merchant, and also as an army-clothier, army-agent, and woollen-draper; and in *September*, 1807, a partnership was formed between the bankrupt and *Enderby*, on the terms contained in a deed of copartnership, bearing date the 24th day of *September*, 1807, between the bankrupt and *Enderby*, by which, amongst other things, they agreed to become and continue copartners in the trade of an army-clothier, army-agent, and woollen-draper, and all matters relating thereto, for the term of ten years from the date of the deed, and that the trade should be carried on in the name of *Gilpin* only, or in the names of

Where *A.* and *B.* were partners, but the whole of the business was carried on by and in the name of *A.*, *B.* never appearing to the world as a partner; and at the dissolution of the partnership, by effluxion of time, all the partnership stock and effects, by agreement between them, were left in *A.*'s hands, who was to receive and pay all the debts due to and from the concern, and to repay by instalments the capital brought in by *B.*; *A.* having continued to carry on the business as before for a year and a half, when he became bankrupt: Held, that all the partnership property and effects so left in *A.*'s hands, and also the debts due to the concern, passed to his assignees, being of the 21 *Jac.* 1.

in the order and disposition of the bankrupt within the intent and meaning of the 21 *Jac.* 1. c. 19. s. 11.

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Gilpin and such other person or persons as should be admitted into the partnership by *Gilpin*, as therein mentioned. The deed also contained stipulations that *Enderby* should bring 20,000*l.* into the concern; that the conduct and management of the partnership business should be under the sole direction and control of *Gilpin*, and that *Enderby* should not be required in any way to interfere (a); that *Enderby* should receive 2000*l.* a year, for his share of the profits, and that *Gilpin* should have all the residue. *Enderby* did advance and pay the said sum of 20,000*l.* to *Gilpin*, and the partnership accordingly began and was carried on between them, from the 24th day of *September*, 1807, to the 24th day of *September*, 1817, when the same determined by effluxion of time, and *Enderby*, from time to time during the continuance of the partnership, received from the bankrupt 2000*l.* in each year, by two half-yearly payments. *Gilpin*, during the partnership, carried on and conducted the business in his own name alone, without any interference by *Enderby*, who took no part whatever in the conduct and management of the partnership business and concerns, and did not appear, and was not known to the world as a partner, but was a

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with the same capital, property, stock, and effects, and in the same manner as he had before carried on the same, during the partnership, and he received some of the debts which were due to him as a partner with *Enderby*, and paid debts which were due from him as well on his own account, as in respect of the copartnership business, without any interference by *Enderby*; and in the course of carrying on such business as aforesaid, after the determination of the partnership, *Gilpin*, the bankrupt, contracted debts with various persons, which debts remained unpaid. *Gilpin* having committed an act of bankruptcy, a commission of bankrupt issued against him, on the 1st day of *April*, 1819, and *Lionel Knowles* the younger, *John Webb*, and *John George Nutting* were chosen and appointed assignees of his estate and effects. After the determination of the partnership, and before the bankruptcy, *Gilpin* paid to *Enderby* a part of the said principal sum of 20,000*l.*, and at the time of the bankruptcy of *Gilpin*, there was due from him to *Enderby* a sum of 15,908*l.* 19*s.* 8*d.*, part of the principal sum, and an arrear of interest. At the time of the bankruptcy of *Gilpin* his property consisted of goods and merchandize, part of which had been the partnership property, but with which he continued to carry on business after the determination of the said partnership; and also of debts due to him, part of which had been contracted during the partnership, and were due to the partnership. *Enderby*, after the said bankruptcy, was called upon to pay, and did pay debts of the said partnership to a very great amount, no part of which had been repaid to him, out of or by means of any partnership effects. The question for the opinion of this Court was, whether the property and effects of the late partnership, and

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the debts due to the said *William Gilpin* on the said partnership account, at the time of the expiration thereof, and at the time of the bankruptcy of *William Gilpin*, or any and what part or parts of such property, effects, or debts, were in the order and disposition of the bankrupt at the time of his bankruptcy, within the intent and meaning of statute made and passed in the twenty-first year of the reign of his late majesty King *James the First*.

In this case a preliminary question arose as to the party whose counsel was entitled to begin, there not being any cause in the Court of Chancery. It was decided, that the counsel for that party who had to support the affirmative of the question proposed for the opinion of the Judges should begin ; and accordingly,

Campbell, for the assignees of *Gilpin*, began. The whole of the property and effects of the partnership between *Gilpin* and *Enderby*, and the debts due on account of it at the time of the dissolution, and of *Gilpin's* bankruptcy, were in the order and disposition of the latter, and passed to his assignees, by virtue of the 21 *Jac.* 1. c. 19. s. 11. There is no distinction between

on business as before, and was in possession of the partnership stock and debts, and was enabled to contract new debts, by means of the credit which that gave him. It is true, that *Enderby* was tenant in common of one moiety, but *Gilpin* was in possession of the whole as of his own property, not as tenant in common. If the tenancy in common had been notorious, *Enderby's* share would not have passed to the assignees of *Gilpin*; but if the latter had such a possession, as to all appearance could only be consistent with the sole ownership, then all the property passed to his assignees. The world never heard of *Enderby* as owner, and, by an express agreement, he renounced all control over the goods, and it was stipulated, that *Gilpin* should dispose of them as he thought fit. This case, then, is within the very words of the 21 *Jac.* 1. c. 19.; it is also within the mischief which that statute was intended to remedy. *Gilpin* acquired a false credit by the possession of this property. It is not necessary for the court to decide, that wherever a firm consists of a dormant and an ostensible partner, and the latter becomes bankrupt, the whole property will pass to his assignees, (although such a proposition might be sustained) for here the partnership was at an end before the bankruptcy of the ostensible partner. There may be a difference between the two cases, for in the former the dormant partner would be liable to all the debts of the firm; and, therefore, those who trusted the ostensible partner would not be injured by any false credit conferred upon him. [*Bayley J.* In some cases they might, viz. if money were lent to him on his private account, and not in the way of his trade; now a man might be induced to lend him money on his private account, in consequence of his apparent owner-

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ship of the whole stock in trade.] Here, à fortiori, the public are injured by the false credit, for the dormant partner will not be liable to debts contracted after the dissolution; but unless prevented by the statute, he may come and claim the property, upon the credit of which the ostensible partner had been enabled to contract those debts. The new creditors, therefore, have been deceived. This case cannot be distinguished from that of a partner retiring, and taking a mortgage upon the effects; but in such case, if the remaining partner becomes bankrupt, the whole property passes to his assignees. *Ryall v. Rolle*. (a) In *West v. Skip* (b), Lord Hardwicke was of opinion, that if *Harwood*, on the dissolution of the partnership which had existed between him and *Skip*, had continued in possession of the property with the assent of the latter, the whole would have passed to his assignees. Perhaps it is unnecessary to make any observation upon *Flyn v. Mathews* (c), which is the next authority, as the explanation of it, given in *Kirkley v. Hodgson* (d) shews, that it is not applicable to the present question. In *Binford v. Donmott* (e) an issue was granted to try the question of partnership, and the result does not appear: but Lord Mansfield then

the present case ; there it was agreed, that the party going out of the concern should have a certain share of the bricks, and it was not there agreed that the other partner should continue in sole possession, and carry on trade, and acquire credit, as sole owner of the property. It rather resembles *West v. Skip*, than the case now before the Court. [Bayley J. Perhaps there had not been time to remove the bricks, and then no laches would be imputable.] The last case on the subject is *Kirkley v. Hodgson*, which decides this question in favour of the assignees of *Gilpin*.

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Parke contra. The case of *Coldwell v. Gregory* is expressly in point, and the Court cannot decide in favour of the assignees of *Gilpin*, without overruling that case : many inconveniences will result from such a decision. Supposing *Enderby* to be solvent (which is the fact) he has already paid partnership debts to a large amount, and will have to pay others, and yet will be deprived of all the partnership property acquired by the contracting of those debts. Or supposing *Enderby* to become bankrupt, the joint creditors, who have contributed to the raising of the joint property, will have no remedy until all *Gilpin's* private creditors are satisfied. [Bayley J. If the creditors became so under an idea that *Gilpin* was the sole trader, is there any case which shews that they could not prove under his commission?] They might prove but could not have a dividend. (a) The question, however, depends entirely upon the construction to be put upon the 21 J. 1. c. 19. s. 11. Here the property was originally

(a) *Ex parte Elton*, 3 Ves. jun. 238.

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partnership property, and was originally in the control of one partner alone: this case is therefore quite different from *Kirkley v. Hodgson*, where the court for the first time held that the statute extends to cases of tenancy in common; and, at the same time, that was carefully distinguished from all cases where the property did not originally belong to the bankrupt alone. So in *Lingard v. Messiter (a)*, *Holroyd J.* says, "If it had been demised to a person who never had been owner, and he afterwards became bankrupt, the mere possession might not be sufficient to shew that he was either real or reputed owner." It makes no difference that the partnership had in this case expired before the bankruptcy. Partnership may be defined as a joint interest in the property, with a mutual power of attorney to make contracts affecting it. The dissolution of the partnership does not alter the property, but merely destroys the power. [*Best J.* That would, in general, be true, but here, by the contract, *Gilpin* was to have all the goods, and *Enderby* was to be a creditor for 20,000*l.*] Then the statute does not apply at all to the case, for if *Enderby* had not the ownership, but merely an equitable lien, he could not take the goods out of *Gilpin's*

tended meaning was given to it. In the present age trade is in a great degree, if not chiefly, carried on by symbols rather than the actual possession of goods; and, therefore, the policy of giving a very large and comprehensive meaning to the statute is, at least, extremely doubtful. The legislature appear now to be of this opinion, for very soon after the case of *Kirkley v. Hodgson* was decided, the 4 G. 4. c. 41. was passed, by the forty-fourth section of which it was provided, that the rights of mortgagees of ships should not be affected by the bankruptcy of the mortgagor, even though the latter continued in possession, and to have the order and disposition of the vessel up to the time of the bankruptcy. Four distinct propositions arise upon the 21 J. 1. c. 19. s. 11. First, that the mere possession of goods is not sufficient to bring the case within the operation of the statute. Secondly, when the property has not originally belonged to the bankrupt, the statute only applies where the apparent and true owner are different persons, or in other words it cannot apply where the bankrupt has a real interest in the goods. Thirdly, a false credit must be obtained; and, Fourthly, the goods must be in the possession, order, and disposition of the bankrupt, with the consent of the true owner. The result of those propositions is that the statute can never apply to partnership property. The first proposition is proved by *Lord Shaftesbury v. Russell* (a), the case of goldsmiths, factors, &c. put by the court in *Mace v. Cadell* (b); *Collins v. Forbes* (c), and *Ex parte Martin* (d), which last case, to a certain extent, proves the second

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(a) 1 B. & C. 666.

(b) 1 Cowp. 232.

(c) 3 T. R. 316.

(d) 2 Rose, 331.

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proposition also, viz. that the statute does not apply where the possession of the bankrupt is connected with title, which is also according to the doctrine of *Joy v. Campbell* (a), where Lord *Redesdale* enters very fully into the object and meaning of the statute; *Howard v. Jemmet* (b), and *Copeman v. Gallant* (c). [Best J. In those cases the bankrupt was a trustee, and it may be conceded that trustees are not within the operation of the statute.] The true ground on which they are excepted is that the real and apparent ownership are not different. *Flyn v. Mathews* is also in point, the true ground of which decision *Mansfield C. J.* in *Mucklow v. Mangles* (d) states to have been that the statute does not apply to cases of tenancy in common. Thirdly, there must be a false credit acquired by the bankrupt, but the mere possession of goods is not sufficient to give such credit. There are so many purposes for which one man may be in possession of the goods of another, that the world cannot be justified in supposing that all the goods in a trader's possession are his own. Fourthly, the possession of the bankrupt must be with the consent of the true owner, and therefore, the statute does not apply where he cannot take possession of the goods.

and *Enderby* renounced all control over them.] Even had he dissented he could not have taken away the goods, and therefore his assent to their remaining in *Gilpin's* hands has not had the effect of giving the latter a false credit. At all events the four propositions are not satisfied by the facts of this case, and, therefore, the goods in question are not within the operation of the statute.

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Campbell in reply. If it be held that this property does not belong to the assignees of *Gilpin*, then his separate creditors who trusted him on the faith of his apparent ownership of the property, will not have any fund to resort to for payment; whereas the joint creditors may resort to this fund, the partnership having been secret, and may also resort to *Enderby*, who is solvent. As to the observation, that this was not originally the property of the bankrupt, the only difference which that makes is, that here the onus of proving the bankrupt to have been the reputed owner is cast upon the assignees; whereas in the other case, it would be for the person claiming the property to shew that the change of ownership was notorious. *Lingard v. Messiter* (a). All the four propositions put on the other side may be admitted. As to the first, possession alone is undoubtedly insufficient; but this was not a mere case of possession, the goods were in the order and disposition of the bankrupt. As to the second proposition it is true, that the real and apparent owner must be different, but that was the case in this instance; for although of one moiety *Enderby* was the true owner, *Gilpin* was the apparent

(a) 1 Barn. & Cres. 308.


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owner of the whole. The corollary attempted to be deduced from that, viz. that the statute does not apply where the bankrupt has a real interest in the goods, by no means follows. It would quite overturn the case of *Kirkley v. Hodgson*, and there is no reason why the statute should not apply to cases of tenancy in common. As to the third proposition, false credit was obtained, and, to use the expression of Lord *Redesdale* in *Joy v. Campbell*, the goods were unconscientiously left in the possession of the bankrupt; and lastly, *Enderby's* moiety of the goods was in *Gilpin's* possession, order, and disposition with the express assent of the owner. There is not, then, any pretence for saying that those goods do not pass to *Gilpin's* assignees.

The following certificate was afterwards sent to the Lord Chancellor:

This case has been argued before us, and we are of opinion that the property and effects of the late partnership, and the debts due to the said *William Gilpin* on the said partnership account at the time of the expiration thereof, and at the time of the bankruptcy of *William Gilpin*, were in the order and disposition of



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SMITH and Another, Assignees of the Estate
and Effects of J. H. SAMPSON, a Bankrupt,
against J. WATSON and J. B. LOCKE.

ASSUMPSIT for money lent and advanced, had and received, and upon an account stated, by and between the bankrupt and the defendants, before his bankruptcy. There was also another count, upon an account stated between the plaintiffs, as assignees, and the defendants. Plea, general issue. The cause was tried before *Bayley J.*, at the last assizes for the county of *York*. The plaintiffs were the assignees of the estate and effects of *J. H. Sampson*, a bankrupt, under a commission, which issued on the 1st *February*, 1823, founded on an act of bankruptcy committed on the 28th *January* preceding. The bankrupt, in 1822 and 1823, carried on business at *Hull*, as a merchant and wharfinger, under the firm of *George Holden and Co.*, and the defendants were bankers there, with whom the bankrupt kept cash. On the part of the plaintiffs it was proved, that the bankrupt, on the 22d *January*, 1823, paid into the hands of the defendants a bill of exchange of that date, drawn by him in the name of *G. Holden and Co.*, upon one *Le Cointe*, for 1689*l.*, payable two months after date, and that the defendants at that time gave him credit in account for that sum. This bill was not accepted when presented, but the amount of it was afterwards paid by the acceptor, and received by the defendants, and by their pass-book it appeared that there was due to the bankrupt, provided the whole proceeds of
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An agreement between *A.*, a merchant, and *B.*, a broker, that the latter should purchase goods for the former, and in lieu of brokerage, should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses, does not vest in *B.* any share in the property so purchased, or in the proceeds of it, although it may render him liable as a partner to third persons.

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the bill belonged to him, a balance of 493*l.* 2*s.* 9*d.* That sum the defendants, on the 12th *May*, 1823, paid, under an indemnity, to one *George Gill*, who claimed to be a partner with the bankrupt in the proceeds of the bill. The defence was, that *Gill* was a partner with *Sampson*, in considerable speculations in whalebone; that the bill was drawn upon *Le Cointe*, upon account of a parcel of whalebone purchased by him, and which was the joint property of *Gill* and bankrupt, and that the defendants were therefore justified in paying to *Gill* the balance due upon that bill. In support of this case it was proved by several witnesses, that in *August*, 1822, it had been verbally agreed, between *Sampson* and *Gill*, that the former should buy whalebone, through *Gill*, as his broker, and that, as a remuneration for his trouble, he should receive one-fourth of the profits arising from the sale, and bear one-eighth proportion of the losses. Under this agreement various parcels of whalebone were bought and sold, which yielded a considerable profit, but all the transactions under it were concluded in 1822. *Sampson* then entered into other speculations in 1823, and continued to employ *Gill* as broker, and upon these latter transactions it was agreed that *Gill* should receive one-third of the profits. It did not appear whether he was to bear any-proportion of the losses on these latter transactions. All the witnesses stated that *Sampson* employed *Gill* to purchase and sell whalebone, as a broker, and that he never spoke of him otherwise than as his agent. It appeared further, that when *Sampson* brought the bill of 1689*l.* to the defendants, in *January*, 1823, he stated that it was drawn upon *Le Cointe* for whalebone. The account of the bankers was kept in the name of *G. Holden* and Co., and there was no other account

in which *Sampson* had any interest. After the bill was paid in, several payments were made on account of *G. Holden* and Co, to a considerable amount; and until the bill was paid there was a balance against that firm. *Le Cointe* refused to accept the bill, until the whalebone was delivered, which did not take place till the 8th *February*, and on that day *Gill* gave the defendants notice that the bill was his. Upon this evidence it was contended, that *Gill* was not a partner in the property purchased, although he might be liable, as a partner, to third persons, in respect of any claims arising out of the speculations before mentioned; and secondly, assuming that he was a partner in the property, he was only a secret partner, and then his share of the property having continued, with his consent, in the order and disposition of *Sampson*, to the time of his act of bankruptcy, passed to his assignees, under the statute 21 *Jac.* 1. c. 19. The learned Judge reserved both the points, and the plaintiffs had a verdict, the defendants having liberty to move to enter a nonsuit. A rule nisi having been obtained for that purpose in last *Michaelmas* term,

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Brougham (with whom were *Parke* and *Alderson*) now shewed cause, and contended, first, that although *Gill* might be liable as a partner to third persons, he had no property in the whalebone purchased. The purchases having been made by him as a broker, must have been made in the name of the bankrupt. He cited *Meyer v. Sharpe* (a) and *Hesketh v. Blanchard* (b), as authorities in point. Secondly, assuming that *Gill* had a property in the whalebone purchased, and in the proceeds of the

(a) 5 *Taunt.* 74.(b) 4 *East*, 144.

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bill, which was the subject of the present action, he was only a secret partner; and then the case of *Esparte Gilpin* is an authority to shew that the balance of those proceeds will pass to *Sampson's* assignees, under the 21 Jac. 1. c. 19. s. 11. (He was then stopped by the Court.)

Tindal, contra, in support of the rule, made two points; first, that *Gill* was the partner of *Sampson* in the whalebone purchased; and if so, secondly, that he had a right, notwithstanding the bankruptcy of the latter, to his share of the proceeds of the bill in question, inasmuch as they had not been mixed up with the general property of the bankrupt. As to the first point, it was agreed in the first instance between *Gill* and *Sampson*, that the former should share in both profit and loss; under such an agreement they must, according to all the authorities, be considered as partners; but assuming that he was not to bear any proportion of the loss upon the purchases made in 1823, still the right to participate in the profits specifically, made him a partner. In *Waugh v. Carver (a)*, it was expressly held that an agreement not to share in losses did not prevent the parties being partners. It is

does constitute a partnership if he have a specific interest in the profits themselves as profits. *Ex parte Hamper*. (a) *Meyer v. Sharpe* (b) has been cited to shew that *Gill* had no interest in the property, but in that case the bankrupt himself proved that he was the sole owner of the cargo. Here there is no evidence to shew that *Sampson* was the sole owner of the whalebone; and if not, then the very agreement to share in the profits makes a party not only liable as a partner to third persons, but gives him a joint interest in that property out of which his profit is to arise, or in respect of which he is to incur a legal liability. Secondly, if *Gill* was a partner, he had a right to claim his share of the proceeds of this bill notwithstanding the bankruptcy of *Sampson*. Here, the bill existed in specie at the time of the act of bankruptcy. It was not accepted till the 8th *February*, and on that very day *Gill* gave notice to the defendants that the bill was his. The proceeds of the bill never mixed with *Sampson's* money, for the balance of the banker's account was always against him until the bill was paid. The bankrupt and *Gill* were tenants in common of the bill of exchange. If *Gill* had been an open ostensible partner, it is clear that he, as solvent partner, might dispose of the partnership proceeds. *Fox v. Hanbury* (c), *Smith v. Stokes* (d), *Smith v. Oriell* (e). This is not a case within the statute 21 *Jac.* 1. c. 19. s. 11. That statute contemplates two different persons, as the true owner and the reputed owner. Here the bankrupt was both. The object of the statute was to put a loan of, or entrusting the bankrupt with goods in

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(a) 17 *Ves.* 404.(b) 5 *Taunt.* 74.(c) *Cowper*, 448.(d) 1 *East*, 365.(e) 1 *East*, 368.

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the same situation as a loan of money, and so to make a dividend only payable in each case. Factors are expressly excepted, and dormant partners ought to be considered as virtually excepted. In *Ex parte Gilpin*, the partnership ceased in 1817, and the share of the dormant partner was suffered to remain in the custody of the bankrupt for two years. But here, at the time of the bankruptcy the partnership still continued, and the bill of exchange was in specie, and before it became due, notice of *Gill's* interest was given to the bankers. In *Kirkley v. Hodgson (a)*, there was an express stipulation, that the bankrupt should continue the apparent owner of the whole ship. There the property once belonged to the bankrupt alone, and he conveyed away part, and kept the possession of the part so conveyed. Here, the whalebone and the bill of exchange did not belong to the bankrupt alone. In *Ex parte Flyn (b)*, the bankrupt was tenant in common, and the interest of his co-tenant in common was held not to pass to his assignees; and that was the true ground of the decision, as appears by *Mucklow v. Mangles (c)*. But in *Coldwell v. Gregory (d)*, the court of exchequer decided, that a dormant partner was not within the statute 21 Jac. 1. c. 19. s. 11. [*Bailey*.]

BAYLEY J. After the discussion which this case has undergone, I do not feel any difficulty in pronouncing a decision upon it. The defendants were the bankers of *Sampson*, who traded under the firm of *Holden and Co.*, and as such, were *primâ facie* bound to account to him before his bankruptcy, and to his assignees after his bankruptcy, for all property which had come from him to their hands. Instead of so accounting, they paid over to *Gill* part of the proceeds of a bill which they had received from *Sampson*. It lies upon them therefore to shew that they were justified in making that payment; for if an agent takes upon himself to make over the property of his principal to another person, the onus lies upon him to shew that he had authority so to do. It is said that they were justified in so doing, because the money was the joint property of *Sampson* and *Gill*, inasmuch as it was part of the proceeds of a bill drawn by *Sampson* for the price of whalebone, which was the joint property of him and *Gill*. Had it been purchased in their joint names, the property in it would have been joint, and the defendants would have been justified in making this payment to *Gill*; but there is no evidence to shew that the whalebone was purchased in the name of *Gill*, or that he ever had any property in it. It is said, that the jury ought, upon the evidence, to have found that *Gill* was a partner in this property; I think, however, that the inference is the other way. All the witnesses speak of *Gill* as a broker, who was to be paid for his trouble in a particular way, viz. by a share of the profits. Now a right to share in the profits of a particular adventure, may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in

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the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject matter of the adventure. *Gill's* right to claim property in the whalebone must arise out of the terms of the bargain with *Sampson*; and looking to them, it appears clearly, that it was not joint property. It may be assumed that it was purchased in the name of *Sampson* only, for *Gill* was a mere agent, and was to have a proportion of the profits in lieu of brokerage. Considering the question in this view, I am clearly of opinion that *Gill* had no property in the whalebone or in the proceeds of the bill; and that being so, the question on the statute of *James* does not necessarily arise, but still the case is very strong in that respect; for, if *Gill* was a partner, it is quite clear, upon the evidence, that he was a secret partner only. The bill was not specifically appropriated to the whalebone account, or to any transaction in which *Gill* was concerned, but was to be applied to the general purposes of *Sampson's* trade. *Gill*, the secret partner, therefore suffered *Sampson* to appear to the world as the sole owner of the bill, and the latter had the order and disposition of the proceeds, with the consent of the true

Sampson and *Gill* that the latter should make purchases of whalebone, and in lieu of brokerage, should have one-third of the profits arising out of the sales, and that he should even bear a certain proportion of the losses, I am of opinion that, although such an agreement might make *Gill* liable as a partner to third persons, yet that it did not vest in him any interest in the whalebone purchased with the money of *Sampson*. Such an agreement would not convert that which was obtained by the separate property of *Sampson* into the joint property of *Sampson* and *Gill*. It may be collected from the evidence that the latter did not furnish any part of the money required to pay for the whalebone, and that the contracts of sale were made, not in his name, but in that of *Sampson*, for *Gill* was to act as broker only, and to receive a share of the profits in lieu of his brokerage. The money paid for the whalebone being therefore *Sampson's* separate property, and the contracts being made in his name as the purchaser, the property in the things purchased would vest, by virtue of the contracts, in him alone. It has been contended that the legal effect of an agreement, to allow to a broker a share of the profits of goods purchased by him, is to vest in the party entitled to that proportion of the profits, the same proportion of the property purchased, and therefore that, in this case, *Gill* became tenant in common or joint tenant as to that part of the property. If *Sampson* had in terms agreed that *Gill* should have that proportion of the property itself, it would no doubt have become the joint property of the two. But here the agreement is wholly different, and it is perfectly consistent with it that *Sampson* should retain the entire interest in the property. It may have been a reasonable bargain that *Gill*, in lieu of a


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brokerage, which was a sum certain, should receive a share of the profits, which were contingent and uncertain. But it might be most unreasonable that in consideration of giving up his brokerage *Gill* should have the same proportion of the property itself, which was purchased with the funds of *Sampson*. *Gill* would thereby have a control over the property itself, while *Sampson* continued the only person, *primâ facie* and ostensibly, subject to all liabilities accruing in respect of it. It would, therefore, be contrary to the intention of the parties, to construe such an agreement to have the effect of giving to the party, entitled to share in the profits, any interest in the property itself. It may, indeed, by a general rule of law, founded upon reasons of policy, render him liable, as a partner, to third persons. But the power over the property in this case remains, as it was before the money was converted into goods, in the purchaser. I am also of opinion, that if *Gill* was a partner he was a secret partner only, and if so, then he, being owner of part of the whalebone, and of the bill which was given in payment for a parcel of such whalebone, suffered *Sampson* to appear to the world as the owner of the whole. The latter continued in



which *Gill* had in this bill of exchange was not in the possession, order, and disposition of the bankrupt at the time of the act of bankruptcy, with the consent of the true owner, within the meaning of the statute 21 *Jac.* 1. c. 19. s. 11. Now, upon the first question, I am clearly of opinion that *Gill* had not any joint interest in this property. The question is not whether he is liable to third persons, as a partner, but whether he had such joint interest. There are many cases where a person may be liable to third persons as a partner, and yet not have any interest in the property. Thus, a person who retires from a house of trade and suffers his name to continue in the firm, after he has ceased to be an actual partner, is liable to the world as a partner, although the property belongs entirely to other persons. It has been urged that this may be considered as a question between *Sampson* and *Gill*, if no bankruptcy had intervened. If the former, in such a case, had brought an action for the balance of the proceeds of the bill, he might have recovered, for it is clear that *Gill* had no share in the property. The person furnishing the capital, and making himself responsible for the debts arising out of the adventure, was surely entitled to the control over the proceeds. All the evidence shews that *Gill* was to act merely as broker, and not to appear as a partner; he, therefore, would not be liable to the engagements entered into in the course of the transaction. It is quite clear, therefore, that the property belonged to *Sampson*; the bill was his, and he paid it into the hands of the defendants, and if that be so then he alone had a right to receive the proceeds from them. But sup-

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posing *Sampson* and *Gill* to have been partners, the latter was clearly a secret partner; and in *Ex parte Gilpin* we decided, that the statute 21 Jac. 1. c. 19. s. 11. applied to a secret partner, who permitted his share of the partnership property to continue in the possession of the bankrupt up to the time of his bankruptcy. We could not have certified as we did in that case unless we had thought that the case of *Coldwell v. Gregory* could not be supported. I was fortified in that opinion by that of the Lord Chancellor, in *Ex parte Dyster*. Independently of that authority I think that the decision in *Coldwell v. Gregory* cannot be supported without repealing the statute, which contains no exception in favour of secret partners. I cannot, indeed, readily, conceive any case more completely within the mischief which the enactment was intended to remedy. For if a secret partnership could be set up as an answer to assignees claiming property which had been left in the order and disposition of the bankrupt, as apparent owner; enormous debts, unconnected with the partnership business, might be contracted upon the credit gained by the possession of property, which a person wholly unknown to the creditors might claim to the

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CASH and GOODWIN, Assignees of PACKWOOD, a
Bankrupt, *against* EDWARD YOUNG.

TROVER for a quantity of carpet. The first count was on the possession of the bankrupt, and the conversion was laid before the bankruptcy; second count, on the possession of the assignees. Plea, general issue. At the trial before *Abbott C. J.*, at the last *London* sittings in *Trinity* term, it appeared, that *Packwood*, who kept a shop at *Radcliffe-highway* (a), committed an act of bankruptcy on the 13th of *December*, 1822, whereupon a commission issued, dated the 9th of *January*, 1823, and an assignment was made to the plaintiffs on the 1st of *February*, 1823. On the 24th of *December*, 1822, the defendant's wife went to the bankrupt's shop, and ordered the goods in question, which were sent home to the defendant's house, and they were paid for a few days afterwards, the shop of the bankrupt being still kept open. The plaintiffs demanded the goods on the 15th of *March*, 1823. The Lord Chief Justice left it to the jury to say, whether the goods were bought and paid for, *bonâ fide* in the ordinary course of trade, directing them, if that was their opinion, to find for the defendant, and giving the plaintiffs leave to move to enter a verdict for the value of the goods. The jury having found for the defendant, a rule was obtained in *Michaelmas* term, according to the leave reserved, against which

Where *A.* bought goods of a trader who had previously committed an act of bankruptcy, and paid for them *bonâ fide* without knowledge of the bankruptcy: Held, that the assignees under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 J. 1. c. 15. s. 14.

(a) This is not within the city of *London*.

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Campbell now shewed cause. It having been found by the jury that the goods were bonâ fide bought and paid for in the ordinary course of trade, if it be held, that the plaintiffs are entitled to recover, no person can with safety buy and pay for goods any where out of the city of *London*. The defendant, however, is clearly protected by the equity of the 1 *Jac.* 1. c. 15. By the fourteenth section it was provided, "that no debtor of the bankrupt should be thereby endangered for the payment of his or her debt, truly and bonâ fide to any such bankrupt, before such time as he should understand or know that he was become bankrupt." Now the assignees could not have maintained an action for goods sold and delivered. [*Bayley J.* Because they would thereby have affirmed the sale. *Smith v. Hodson. (a)*] The object of the statute was, to put the assignees in the same situation as if payment had been made to themselves. If they could recover in this action, the defendant would have no remedy to recover back the money paid to the bankrupt, and would, therefore, be endangered by such payment made bonâ fide. There is no real distinction between sales before or after an act of bankruptcy. At the time when the payment was

Coles v. Robins (a) is expressly in point for this defendant, and must be overruled, in order to give judgment for the plaintiffs. In *Hurst v. Gwennap* (b), the only case remaining to be noticed, the goods had not been paid for, the statute therefore did not apply.

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Tindal, contra. The plaintiffs are entitled to have a verdict entered in their favour. It may be admitted, that a hardship will in some cases be the consequence of such a decision; but, notwithstanding that, the Court must decide what the law is, upon the proper construction of the several acts relating to bankrupts. No proposition is more clear, than that, by relation, the assignment operates from the first act of bankruptcy committed after the petitioning creditor's debt accrued. That was the case on the earlier bankrupt acts, without any exemptions whatever. To remedy the hardship arising from such a state of the law, that relation has, to a certain extent, been abridged by subsequent statutes, and the question is, whether they reach the present case. [*Bayley* J. May not the bankrupt, under such circumstances, be considered as the agent for those who may become his assignees.] That must depend on the statute. The only thing to be considered is whether the legal property be or be not by relation in the assignees from the time of the act of bankruptcy. The argument for the defendant is founded entirely on the 1 Jac. 1. c. 15. s. 14.; that section is introduced by way of proviso, and the words of it are "no debtor of the bankrupt;" in this case defendant was a debtor of the assignees, not of the bankrupt, [*Bayley* J. Was he not quodam modo debtor of the

(a) 3 Campb. 185.

(b) 2 Starkie, 306.

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bankrupt, could not the latter have sued him if no commission had issued ?] The preceding clause shews that "debtor of the bankrupt" means in respect of a contract made when the bankrupt was able to contract, and the fourteenth section comes by way of proviso to that. The object of the thirteenth section was, to put into the hands of the assignees all that would be assets for the payment of the creditors. [Abbott C. J. Suppose a promissory note had been given to the bankrupt for the price of the goods, could the assignees have declared upon it as a note given to themselves; they might certainly have indorsed it, which shews that the property vested in them.] The 1 Jac. 1. c. 15. s. 14. was made to protect the payment of money to the bankrupt, and did not extend to the delivery of the bankrupt's goods to him after his bankruptcy. This appears from the 56 G. 3. c. 137., which was made expressly to protect the party making such delivery bonâ fide without notice of the bankruptcy. The 21 Jac. 1. c. 19. s. 14., provides that no purchaser for good and valuable consideration shall be impeached by virtue of that act, or any other act theretofore made, unless the commission issue within five years after the act of bankruptcy. That

fide purchasers under considerable hardship, and a remedy was provided by the 46 G. 3. c. 135., which protected all contracts or payments made two months before the issuing of the commission. If the Court decide for the defendant in this case, they must hold, that the assignees cannot disaffirm any contracts made bonâ fide with the bankrupt, for the payment of the money makes no difference. *Copeland v. Stein.* (a) [Bayley J. That was decided, on the ground, that the transaction was an advance of money, and not the payment of an antecedent debt.] That was one ground, but all the reasoning of the Judges is in favour of the present plaintiffs. Then, *Hurst v. Gwennap* is expressly in point, for if trover could be maintained, the delivery of the goods must have been tortious; so here, if the delivery was originally tortious, the subsequent payment would make no alteration.

ABBOTT C. J. This is certainly a case of much importance, but considering the very small number of cases that can be found bearing upon the subject, I cannot help thinking that it has been the common opinion of those administering the bankrupt laws, as well in the higher as the lower branches, that the 1 Jac. 1. c. 15. s. 14. did extend to protect such a payment as the present. There can be no doubt as to the common acceptance of the expression, "debtor of the bankrupt," but it has been argued, that as this section comes by way of proviso, we must look at the preceding section, which gives a remedy to the assignees to recover debts, &c. in these words, "that the commissioners or the greater part of them shall have power to grant or as-

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(a) 8 T. R. 199.

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sign, or otherwise to order or dispose of, all or any of the debts due, or to be due, to or for the benefit of the bankrupt, by what person or persons soever, or in what manner or form soever, to the use of the creditors." Looking at the two sections together, can we say that this defendant was a debtor of the bankrupt within the meaning of the act. I am of opinion that we can. For, if no commission had issued upon the act of bankruptcy given in evidence, he might have maintained an action for the price of the goods. Now, if *A.* may sue *B.* for the price of the goods sold to him, is it possible for us to say that *B.* is not *A.*'s debtor? If we are to decide in this case for the plaintiffs, the mischief will be serious indeed; for it will have the effect of making every person buying any article in a shop in the city of *Westminster* or elsewhere, not in market overt, and paying for it immediately, liable to pay a second time. The clause in question must be considered as a remedial enactment, we should therefore, if possible, so construe it as to remedy the mischief pointed out. I was certainly much struck with the argument, that the 21 *Jac.* 1. c. 19. s. 14., coming by way of proviso to the thirteenth section, extended to the purchase of goods and chattels. But in the thirteenth section, they are mentioned in company with "lands, tenements, and hereditaments," and the enumeration concludes with "other estate." That section also speaks of their being conveyed on condition of repayment of money advanced, and it enables the commissioners to repay the money and have back the estate, &c. And therefore, although the words "goods and chattels" are there inserted, the section more properly applies to "real estate," and being followed by "other estate," it is probable that they were inaccurately used to denote terms for years, rather than moveable

goods. Our construction in this case does not render unnecessary that section as to real property. The 46G.3. c. 135. is expressed in such general terms, that no argument can, with any certainty, be founded upon it. Upon the whole, then, it seems that this is not a constrained or forced interpretation of the 1 Jac. 1. c. 15. s. 14., and it agrees with the case of *Coles v. Robins*. I am therefore of opinion, that the verdict was properly found for the defendant.

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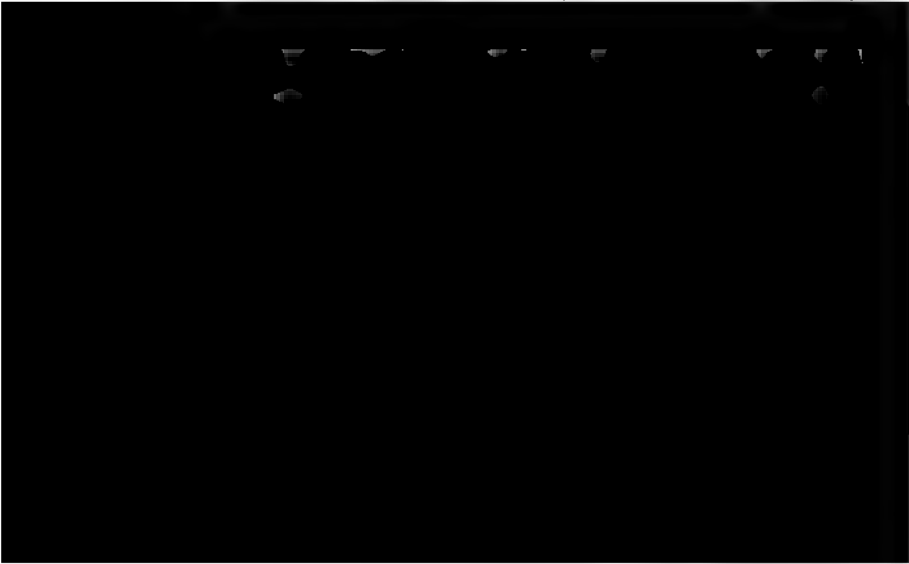
BAYLEY J. I think that the payment in dispute is protected by the 1 Jac. 1. c. 15. s. 14.; and that the assignees cannot maintain trover, without at least tendering back the money paid. There is no doubt that, generally speaking, the assignees are entitled to all the property of the bankrupt at the time of the act of bankruptcy, and may disaffirm all acts done by the bankrupt, unless prevented by some positive enactment. But if that were the rule without exception, much injustice would be worked. Until the 1 Jac. 1. c. 15. was passed, the lapse of time gave no protection, and although the bankrupt went on to trade for any length of time after he had committed an act of bankruptcy, no payments to him were protected, unless made in respect of sales in market overt. There is a well known maxim, “*vigilantibus jura subveniunt*,” and therefore, when an act of bankruptcy has been committed, the creditors should as soon as possible sue out a commission; but if they might take away goods afterwards sold by the bankrupt and paid for, and so obtain both the goods and the money, it would be their interest to postpone their proceedings. Then does the statute apply to this. The words of the thirteenth section are applicable, as well to goods sold after, as to those sold before an act of bankruptcy. It must therefore be construed

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strued to extend to debts due upon all such sales, and the meaning of the fourteenth section (that being by way of proviso to the whole of the thirteenth,) must be equally extensive. Was then the defendant a debtor of the bankrupt? The latter might have sued him, and under such circumstances he bonâ fide pays the debt. Even if he could prove under the commission, or bring an action against the bankrupt for the money paid, still he would be endangered for the payment, and the statute says he shall not be endangered. In *Hurst v. Guennap* there was no payment, and therefore no question could arise upon the meaning of this proviso; and in *Copeland v. Stein*, the factor advancing money did not do that as a debtor of the bankrupt, but as a mere lender of money. The facts of *Coles v. Robins* are not to be distinguished from the present. I am therefore of opinion upon that authority, and upon the reason of the thing, that this rule for entering a verdict for the plaintiffs must be discharged.

HOLROYD J. I am of opinion that this action is not maintainable by the assignees of the bankrupt; the defendant being protected by the 1 J. 1. c. 15. s. 14.,



point, and, in my judgment, it was there rightly held, that the statute should be liberally construed. This is within the words and spirit of the act, and also within the mischief intended to be remedied. If such a payment as the present had not been protected then until the passing of the 21 J. 1. c. 19., whatever period of time elapsed between an act of bankruptcy and the issuing of a commission, the assignees might have claimed all goods sold by the bankrupt during that period, although paid for; and so have had the benefit both of the goods and the money. And after that statute, they would still have had a similar power whenever a commission issued within five years after the act of bankruptcy, until that was further limited by the 46 G. 3. c. 135. But before the issuing of a commission, the bankrupt might have sued this defendant; the latter, therefore, in paying the money, only did that which the law would have compelled him to do. Being by law compellable to pay, the payment did not make him a wrong-doer, and he is protected by the 1 J. 1. c. 15. There are cases in which it has been held that the property does not vest absolutely in the assignees for all purposes, but that the bankrupt remains quodam modo the owner. (a) For these reasons I agree that this rule must be discharged. (b)

Rule discharged. (c)

(a) *Ashley v. Kell*, 2 Str. 1207.

(b) See *Saunderson v. Gregg*, 3 Stark. N. P. C. 72. Semble, contra.

(c) *Best J.* was sitting at Nisi Prius.

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WILLIAM THOMPSON, JOHN ARMSTRONG, and RICHARD THOMPSON *against* THOMAS GILES, SAMUEL GREGSON, and JOHN CHARNLEY, Assignees of the Estate and Effects of ALEXANDER ANDRADE and THOMAS WORSWICK, Bankrupts.

A customer was in the habit of indorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash paid.

THIS was an action of trover, brought by the plaintiffs to recover the value of certain bills of exchange stated and set forth in the declaration. At the trial before Abbot C. J., at the Summer assizes for Lancaster, 1822, a verdict was found for the plaintiffs for 2539*l.*, subject to the opinion of the Court upon the following case.

The plaintiffs were partners under the firm of *William Thompson and Co.*, in a silk manufactory near Lancaster, and for many years past had kept a banking account with *Thomas Worswick, Sons and Co.* being the firm in which *Alexander Andrade* and *Thomas Worswick* carried on their business of bankers prior to their failure.

The defendants were the assignees of *Alexander Andrade*.

hereinafter mentioned. They remained in the bankers' hands till their bankruptcy, when they were taken possession of by the defendants as assignees, and converted to their own use. The account of the plaintiffs with the firm of *Thomas Worswick, Sons, and Co.* had continued for many years, and was kept in following form in the pass-book or banking-book, and it was the course of dealing of the bank to keep the accounts in this form.

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Messrs. *W. Thompson and Co.* in Account with *T. Worswick, Jones, and Co.*

| Dr. | | | | Cr. | | | |
|-------------------|-----|----|----|--------------------|------|----|----|
| 1821. | £ | s. | d. | 1821. | £ | s. | d. |
| July 4. To bank - | 80 | 0 | 0 | July 1. By balance | 1300 | 0 | 0 |
| 5. To draft - | 100 | 0 | 0 | 2. bills - | 750 | 0 | 0 |

At the end of every half year an account was sent into the plaintiffs from the bankers. In the account at *Christmas, 1821*, and also in the pass-book, a bill for *689*l.* 16*s.**, one of those in question in the action, was included, being one of several bills paid in on the *10th December, 1821*, and it formed part of the cash balance of *941*l.* 2*s.* 5*d.**, therein stated to be due to the plaintiffs. The mode of keeping the account with the plaintiffs and other customers of the bank was this. When the customer paid bills into the bank, such as the bankers approved of, they were never written short, but entered on the day they were paid in in the pass-book, and also in the books of the bank, to the credit of the customer, in the form above stated, and after such entry the customer was at liberty to draw to the full amount, appearing to his credit, by checks on the bank. Bills disapproved of

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were not so entered, but were sometimes returned, sometimes deposited till due. All bills so entered, whether made specially payable to the customer or not, were indorsed by him, or if for any private reasons he did not wish his name to appear on the bills, a letter was given to the bank, acknowledging himself to be equally liable as if he had indorsed. An interest account was kept, not in the pass-book but in the bank-books, in which the customer was debited with interest, on each cash payment to him, from the date of the payment, and on each payment in bills from the period when the bills were due and paid; and on the other hand he had credit for interest from the date of each cash payment by him, and from the period when each bill paid in by him became due and was paid. As the accounts were balanced half yearly, if a bill was paid in which did not become due before the end of the half year, the customer was debited with the interest up to the time when the bill was due. The balance only of the interest was entered in the pass-book, and this was the usual mode of keeping an interest account. If only the undue bills paid in by the plaintiffs were taken out of the account, made up to the 31st December, the plaintiffs' account

county of *Lancaster*, to use bills so paid in by paying them away to their customers as they thought fit. The bank of *Worswick* and Co. were in the habit of paying away such bills to their customers almost every day and hour, and to the amount of many thousands every week; and the circulation of the town of *Lancaster* and the county at large was conducted in a great measure by bills so paid in, and afterwards paid away by the bankers; and if that had not been done, each bank would have required an immense unemployed capital of bank notes, or have been obliged to draw on their correspondents in *London*, and thereby considerably increased their expences. This proof was objected to by the plaintiffs' counsel, but was received, subject to the opinion of the Court as to its admissibility. No direct proof was given that the plaintiffs were acquainted with this practice; and the plaintiffs never received any thing from the bankers but cash notes and bills drawn by the bankers upon their *London* agents.

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F. Pollock, for the plaintiffs. The bills sought to be recovered in this action were entered as bills and not as cash to the credit of the plaintiffs; they remained in specie in the hands of the bankers at the time when they became bankrupts, and may therefore clearly be claimed by the plaintiffs. A banker is a factor for money. That was established by *Giles v. Perkins* (a), which was afterwards acted upon in *Hughes v. Spooner*, (b) tried before *Best J.* at *Warwick*. From that time this has been universally considered as the law, and the commercial world have been governed by it. That alone would be sufficient to make the Court pause before they over-

(a) 9 *East*, 12.

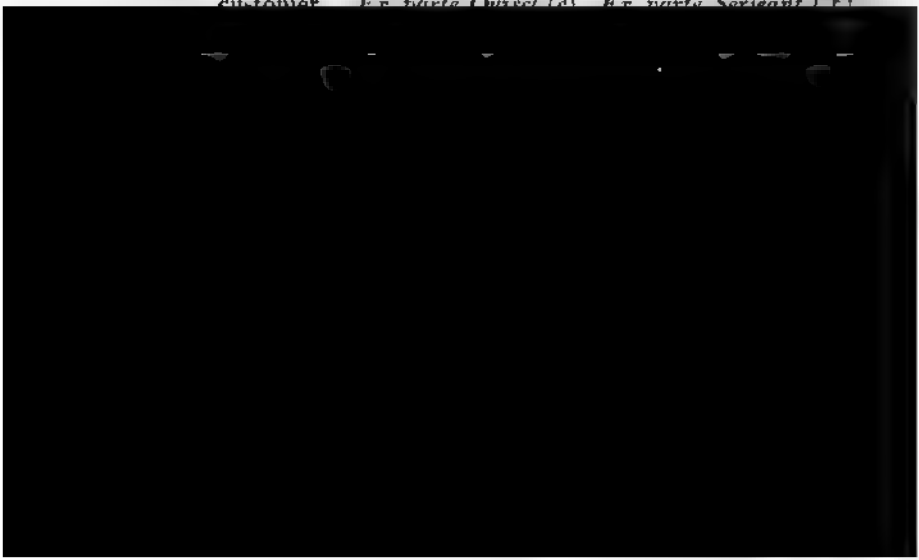
(b) Not reported.

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turned the decision, even if the propriety of it were not apparent, but it is, in fact, supported by a series of earlier cases, *Ex parte Dumas* (a), *Zinck v. Walker*. (b) In *Bolton v. Puller* (c), the same rule was recognised as law, and that case proceeded entirely on the ground, that the banker had negotiated the bills. The reason for holding, that bills in the hands of a banker do not pass to his assignees, is explained by *Buller J.* in *Bryson v. Wylie* (d), where he observes, that by the course of trade bankers and factors have the goods of other people in their possession, and therefore it does not hold out a false credit to the world.

Parke contra. This is merely a question of fact, and not of law. It is perfectly clear, that where a banker, employed as an agent to receive bills when due, becomes bankrupt, having the bills entrusted to him remaining in specie in his hands, they continue the property of the customer, and do not pass to the assignees. But if, on the other hand, bills are remitted to him on the general account, and are not distinguished from the cash items, then they cannot be reclaimed by the customer. *Ex parte Ouseley* (e). *Ex parte Serjeant* (f).



customer might have sued the banker for the amount of the bills, as soon as they were entered to his credit.] It is to be inferred from the mode of dealing, that the customer was immediately entitled to draw for cash to the amount of the bills. Then it is found that the bankers in the county of *Lancaster*, and particularly the bankrupts, were in the habit of using the bills paid in as their own; and that practice being well known, it must be presumed that the plaintiffs assented to it, as they never gave any directions to the contrary. Unless the custom was such as to authorize the using of the bills, the bankers would be liable to the penalties imposed by 52 G. 3. c. 63. which enacted that bankers and others, applying to their own use bills and other property deposited with them, under certain circumstances, and for certain purposes, shall be deemed guilty of a misdemeanor, and be transported for fourteen years, or receive such other punishment allowed by law in cases of misdemeanor, as the court before whom the party is tried shall adjudge. Yet it could never be said that the acts of the bankrupts in this case were within the meaning of that statute. [*Bayley J.* If they disposed of the bills in the manner stated, knowing themselves to be on the eve of a bankruptcy, they would not, I think, be free from danger.] There was also evidence of a mode of dealing, when the bankers did not choose to treat the bills as cash, different from that adopted with respect to the bills in question, which confirms the idea that they were treated as cash. *Giles v. Perkins* is certainly an authority for these plaintiffs, if that is to be taken as deciding, as an abstract proposition of law, that a banker is always to be considered as an agent. It has not, however, been so construed, for the most important decisions on the point have arisen since, and the Lord Chancellor

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in them has taken great pains to ascertain from the evidence what bargain was in each case made between the parties. *Ex parte Serjeant, Ex parte Pease*. The court in this case are placed in the situation of a jury, and may, therefore, decide upon the facts before them, without feeling bound by former decisions. [Bayley J. In *Giles v. Perkins* it was found that the bills were entered as cash.] Here one bill for 689*l.* was certainly treated as cash; it was in effect discounted, for in the half yearly account the customer was charged with interest, and made no objection. But supposing the bankers to have been agents only, still, if they had had the assent of the customer, that they should use the bills as they pleased, they were in their order and disposition, and passed to their assignees under the 21 J. 1. c. 19. s. 11., the bankrupts not being factors within the meaning of the exception in that statute.

BAYLEY J. I quite agree with the observation, that this is rather a question of fact than of law. But if the circumstances are such as enable us to say, without difficulty, what ought to be the verdict of a jury upon them, we are at liberty to decide the question, when thus brought

continue the property of the customer. *Scott v. Surman*(a) and *Bolton v. Puller* establish that as a general rule. That being so, is it probable that such a bargain as that suggested would be made? What benefit would the customer derive from having the bills considered as the property of the banker? In the absence of any valuable consideration, it seems to me that it would be very unreasonable in a banker to ask, and very imprudent in a customer to accede to such terms. I should not, therefore, be disposed lightly to infer such a contract. But it is said, that it must be inferred from the course of dealing between the parties, and from the usage of the bankrupts, and other bankers in the county of *Lancaster*. It appears, however, that the bills were not entered as cash, but as bills, and although the amount was carried into the cash column, it does not follow that the customer assented to their being considered as cash. It is only an undertaking on the part of the banker to answer drafts in advance to the amount of the bills so entered. By indorsing the bills paid in, or by giving a guarantee when he did not choose to indorse, the customer might enable the banker to negotiate the bills, and a bonâ fide holder might have a right to retain them. But the banker could only be justified in negotiating them when that was rendered a reasonable course by the state of the customer's account. The case, indeed, states it to have been the custom of bankers in the county of *Lancaster* to use bills paid in by their customers, but it does not state that they so used them as their own, without reference to the customer's account. The cases arising out of *Bolderos's* bankruptcy,

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(a) *Willcs*, 400.

which

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which have been referred to (a), were not ordinary cases between banker and customer, but between a country banker and a paid agent in *London*. The Lord Chancellor so considered them, and was therefore under the necessity of examining the facts minutely, in order to ascertain what was the real bargain. *Ex parte Serjeant* comes nearer to this than any other case that has been cited, but still there is a plain distinction between them. There the bills and cash were entered in the running-account, without distinction, here credit is given for bills, the items on the face of them appear not to be cash. This case is, therefore, much stronger for the plaintiff than *Ex parte Serjeant* was for the petitioner, yet even there the Lord Chancellor appears to have thought that the customer was entitled to the bills. At all events that case shews, that even where bills are entered as cash, the assent of the customer to their being so considered must be proved, and that the onus of proving it lies on the banker. Upon the whole, then, I am of opinion that there is no foundation for supposing that a bargain had been made enabling the banker to use as his own the bills deposited with him. That is a bargain of such a nature as ought not to be presumed without

cover the amount of all those bills that remained in the hands of the bankers at the time of their bankruptcy.

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HOLROYD J. I am of opinion that the bills in question did not, under the circumstances of this case, become the property of the bankers, and that the defendants, therefore, have not any sufficient answer to this action. It is perfectly clear, as a general rule, and indeed is not disputed on the present occasion, that if a customer pay bills into a banker's hands, although it gives him a right to expect that his drafts will be honoured to the amount of the bills paid in, yet the property in the bills is not altered; they still remain the property of the customer, although the banker may have a lien to the extent of his advances. The defendants must, therefore, shew such special circumstances as will operate to change the property, and vest it in the assignees, either as standing in the situation of the bankrupts, or by virtue of the 21 *Jac.* 1. *c.* 19. *s.* 11. There is not, I think, sufficient stated in the case to sustain either of those positions. There can be no doubt that the bills were placed in the bankers' hands, in order that he might receive the money upon them when due, but they were not in his order and disposition, and, therefore, not within the 21 *Jac.* 1. *c.* 19. Can we then say that these bills have, either by operation of law, or by facts raising a conclusion of law, become the property of the bankrupt? The facts stated would not justify such a finding by a jury. In *Giles v. Perkins*, and the case cited, which was tried before my Brother *Best*, it was held, that an entry of bills as cash was not of itself sufficient to convert the property. The full amount too of the bills appears, in this instance, to have been entered in the cash column. Now it is hardly

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hardly to be supposed, that the bankers intended to debit themselves presently with the whole sum that was to be received in future. In order to change the property, it must be shewn that the bankers bought the bills, or discounted them, which is indeed the same thing: then the customer might have immediately sued the bankers for the price which they agreed to give for the bills, but still retained in their hands; and if the customer did not indorse the bills, and they were afterwards dishonoured, the bankers, under such circumstances, would have no remedy against him. Is there sufficient in this case to shew that the bills were either bought or discounted by the bankers, so as to make the price the property of the customer? They were entered as bills, not as cash, and even if the latter mode of entry had been adopted, it would still, according to *Giles v. Perkins*, admit of explanation. In what light does the banker appear to have considered them in his half-yearly account? In the pass-book they are entered at the full amount; that would not shew that they were discounted. In the interest account interest upon the amount is charged upon each bill until it was actually paid; but when a bill is discounted the interest to be deducted is

I doubt much whether there was sufficient to enable a jury to find that the customer assented that the bills should become the property of the banker. If that had been intended they would have been entered as cash, deducting the discount. Upon the general question, therefore, I think that there must be judgment for the plaintiffs, and I am unable to discover any real distinction between the right to the bill for 689*l.*, and the others remaining in the hands of the bankrupts at the time of their bankruptcy.

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BEST J. I agree entirely with the opinion expressed by my learned Brothers in this case. It is perfectly clear that, if a person places in his bankers' hands bills not due, the property continues in the party paying them in. If by any accident they were destroyed, without the default of the banker, the loss would not fall upon him, but upon the customer. As the property continues in the customer, and as it is well known that bankers receive bills as factors or agents, to obtain payment of them when due, they do not, in case of bankruptcy, pass to the assignees by the 21 *J. 1. c. 19. s. 11.* Bills may be paid in under such circumstances as would furnish evidence of a transfer of the property; but that has been properly treated as a question of fact. The only fact in this case upon which the defendants can rely, and which did not exist in *Giles v. Perkins*, is the custom prevailing amongst the bankers in the county of *Lancaster*. I much doubt whether evidence of that custom could be received in this case. The property of one person is not to be affected by agreements made between others. The only question here was, how far the plaintiffs assented to give the bankers an absolute control over their bills. There is not a single expres-
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sion in the case to shew such assent. The 52 G. 3. c. 63, furnishes a strong argument against these defendants, for it shews that the legislature thought it extremely improper for bankers or others to negotiate bills (amongst other securities) entrusted to their care. I do not mean to say that the bankers in this case incurred any of the penalties imposed by that act; it is unnecessary to decide that point here; but I would, by no means advise persons in their situation to take it for granted that they may with impunity act in the same manner.

Postea to the plaintiffs.

BULKELEY and Others *against* BUTLER (in Error).

In an action by the indorsee, against the acceptor of a bill of exchange, whereof E. S. was the payee, the plaintiff proved that a

ASSUMPSIT by the first indorsee against the acceptors of a foreign bill of exchange, drawn by *J. Bulkeley and Son*, dated *Lisbon, August 6th, 1816*, upon the defendants in *London*, payable to the order of *Edmund Shanahan*, and by him indorsed to the plain-

record, when brought into this court by writ of error, after setting out the pleadings and continuances, stated, that on a certain day the cause came on to be tried, and that one *W. Barron* was produced and examined as a witness for the plaintiff, and stated, that in the month of *August*, 1816, he was a clerk in the house of the plaintiff at *Cadiz*. That on the 10th of *August* in the same year, a person calling himself *Edmund Shanahan*, came to the plaintiff's house at *Cadiz*, and produced a letter of recommendation (which was then produced by the witness, and read for the plaintiff) in consequence of which the plaintiff received and entertained him. The letter was as follows: "*Lisbon*, 29th *July*, 1818. Sir, this will be handed to you by *Edmund Shanahan*, Esq. who in his travels through *Spain* on commercial pursuits, will pass some days at your city. This gentleman has been introduced to us by a very particular friend, and we take the liberty to recommend him to you, and to request that you give him every necessary information to guide his operations, &c. Signed, *M'Donnell*, Brothers, and Co." The witness further stated, that he knew *M'Donnell* and Co., and that the letter was their hand-writing. On cross-examination, he said that he knew the said *E. S.* then (when he presented the letter) but not before. Being further examined in chief, the bill declared upon being shewn to him, he said that he first saw it produced by the person calling himself *E. S.*, who had been in *Cadiz* from the 10th to the 19th of *August*, that he had seen him during that period ten or twelve times, and dined with him at the plaintiff's house every day between the said 10th and 19th of *August*; that on the 19th of *August* the person calling himself *E. S.* produced the bill, and said that he had come from *Ireland* with goods which he had sold in *Lisbon*,

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Lisbon, and the produce of them he had brought in bills, which he then requested the plaintiff to forward for acceptance, and that he should probably require some of the money on that day; the said person, calling himself *E. S.*, left the said bill unindorsed, together with others, with the plaintiff, on the 19th of *August*, and returned again on the 20th, and then asked the plaintiff to negotiate the said bill on his own account, and that he should require the money at *Gibraltar*; that the said person calling himself *E. S.* indorsed the bill and gave it to the plaintiff, who advanced to him a sum of money exceeding the amount of the bill, and also gave him a letter of credit on *Gibraltar*. Being further cross-examined, the witness stated, that when the said bill was delivered to the plaintiff by *E. S.*, he also delivered another bill for 640*l.*, purporting to be a bill drawn by *M^cDonnell, Brothers, and Co.*, which the witness knew to have been subscribed by one of the partners in that firm, and that it had been refused payment on the ground of forgery; and that he (witness) knew nothing more of the person calling himself *E. S.*, than that he came with the letter of recommendation above mentioned, and that he had never seen him since the said

himself *E. S.* with the said *E. S.*, the payee of the said bill, and then and there prayed the said Chief Justice, that he would declare to the jury that there was no evidence before them of the indorsement of the said bill of exchange by the payee therein mentioned. Yet the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, that although in law there should be some proof of the identity of the person making the indorsement, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange, so that no person would take one. That, therefore, the question for the said jury to consider was, whether there was or was not sufficient evidence of identity in this case to satisfy them, there being none to the contrary, nor any evidence of there being any other person of the name of *E. S.* connected with the bill; that the circumstance of the person calling himself *E. S.* having produced to the plaintiff and the witness the genuine letter of recommendation or introduction, and the bill of exchange actually subscribed by *J. Bulkeley and Son*, and by *M'Donnell, Brothers and Co.*, whose firms and hand-writing were known at the time to the plaintiff, were material to prove the identity. And the said Chief Justice did further deliver his opinion, that the said evidence above set forth was reasonable evidence to be left to the jury, to be by them considered, whether the said indorsement was the indorsement of the person to whom the said bill was made payable; and thereupon, with that direction, left the same to the jury, who declared themselves to be satisfied of the identity of the said *E. S.*, concluding in the usual form. The case was now argued by

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Wilde for the plaintiff in error. There was not any evidence to be left to the jury as tending to identify the payee of the bill, *Edmund Shanahan*, with the person who indorsed it. It may be admitted, that if any one fact given in evidence tends to prove that identity, the judgment must be affirmed. All the evidence given was admissible for other purposes, but was not competent evidence on this part of the case; the only witness to this point was *Barron*, who, at the time of the indorsement was clerk to the plaintiff. He merely proves that a person calling himself *E. S.*, but whom the witness did not know before, came to the plaintiff's house at *Cadix*, and there produced and indorsed the bill [*Bayley J.* He had documents with him which no one but *E. S.* ought to have had.] Bills of exchange may, for a variety of purposes, be innocently in the hands of other persons than the owner. If possession is sufficient, then in any case a person may pass a bill by indorsing on it the name of the payee. [*Best J.* Proof of the identity of a party indorsing is never required in ordinary cases.] In many cases evidence of the hand-writing carries with it evidence of the identity, for the party is known to have passed in public by the name which

are not known either to the drawer or acceptor. Suppose the case of an indictment, in which it would be necessary to prove that the defendant was *E. S.*, would that be done by shewing that he was in possession of a bill payable to *E. S.*? Or suppose an action against *E. S.*, and a plea in abatement and issue thereon, would the identity of the party be made out by shewing that such a document was in his possession? What this person told the plaintiff cannot be evidence, neither can what the plaintiff did be evidence, for this purpose; he might receive the man as *E. S.*, but there is no evidence that any one else did. It may prove that he acted *bonà fide*, but does not carry the case beyond that: neither does the letter of introduction tend to prove that the bearer was *E. S.* In order to give it that effect it should first have been shewn that the bearer had been at *Lisbon*. The letter itself is only a statement *à priori* that something would be done (*viz.* that *E. S.* was coming to *Cadiz*) which might be defeated, and still further, the writer does not affect to speak from his own knowledge, but merely states, that some other person had informed him that a particular individual was *E. S.* It might be proved as part of the *res gestæ*, that such a letter was produced to the plaintiff, but that did not make the contents evidence; the writer should have been called to speak to them, and then he might have been cross-examined. There is no evidence that he ever acted upon the introduction, further than by writing that letter; no evidence that the bearer of it had been at *Lisbon*, or was the person introduced to *M^cDonnell*. This surely was not the best evidence that was within the reach of the party, and that is the evidence which, according to the rules of law, he should have

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been called upon to give. *Phillipps on Evidence.* (a) In the same book, there is a rule cited from *Beccaria*, c. 14., that where proofs are dependant on each other, if the ground-work fails, the superstructure must fall. Now the whole of this case depends on the question whether the person introduced to *M'Donnell* was or was not *E. S.* There is no evidence that he was, and, therefore, the whole falls to the ground: — no reason was given for not calling *M'Donnell*. But supposing this to have been evidence fit to be left to a jury, it should have been left to them simply as a question, whether the identity of *E. S.* was or was not made out. Now in all cases the same evidence of the same fact should be required; but another rule was given by the Lord Chief Justice; he declared, that although there should be some proof of identity, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange, so that no person would take one. [*Bayley J.* Your exception came before that; your contention was, that there was nothing to be left to the jury.] The whole appears upon the record which is brought here by writ of error; the Court, therefore, must deal with the whole, and pronounce that judgment

Was the evidence admissible to prove the identity of *E. S.*? Was it sufficient for that purpose, and was there any thing improper in the direction of the Judge so as to warrant the Court in directing a venire de novo? As to the first question, there is a good deal of fallacy in supposing that the letter was admitted as evidence of its contents. If it were necessary to decide that it was admissible for that purpose, I should hesitate before I acceded to such a proposition. But the possession of that letter, together with the other circumstances proved in the case, was evidence fit to be left to the jury as to the identity of *E. S.* If a person has in his possession a document which ought to be in the hands of the owner, that raises a presumption that he is the right owner. Here then there was a bill proved to be genuine, payable to *E. S.*, a thing of value, and likely to be in the possession of the owner; possession of that, therefore, raised a presumption of ownership. But the person who indorsed the bill was in possession of another document, the letter of introduction, also proved to be genuine, which ought not to have been in the possession of any person but *E. S.* I certainly do not much rely on the possession of the bill for 640*l.*, because it did not appear to whom it was made payable. But independently of that, the indorser of the bill in dispute appears to have been in possession of two documents which belonged to *E. S.* I quite agree that a bill may, in many cases, be in the hands of another than the owner, but in the absence of all evidence, that the bill had got out of the hands of the right owner, possession is evidence of ownership. But the proof of identity does not stop here. The party came

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to *Cadiz* on the 10th of *August*, gave the letter of recommendation to the plaintiff on that day, and remained at that place until the 19th without producing the bill in question. No evidence was given as to his general conduct at *Cadiz*, neither party thought proper to enquire into that, but it was shewn that he dined at the plaintiff's house every day, where he might at any time have been seen by other persons. Between the 10th and 19th nothing passed calculated to excite a suspicion that this person was not *E. S.*, and then he produces the bill to the plaintiff, leaves it with him until the following day, when he gets cash for it and also a letter of credit. The whole evidence of identity then is, that a person calling himself *E. S.* comes to *Cadiz*, and remains there for a considerable period of time, in which he might probably have been detected had he been committing a fraud; he has in his possession a bill the property of *E. S.*, and a letter of recommendation given to a person introduced at *Lisbon* as *E. S.* I cannot bring myself to doubt that this was admissible evidence to be left to the jury. Then was it sufficient to warrant the verdict found. In order to judge of that we must look at what was proved on one side, and what might have been, but

I think, therefore, that the jury arrived at a reasonable conclusion from the evidence submitted to them. Then was the direction of the Lord Chief Justice correct in point of law? I think it was, the law does not require such evidence of identity as would clog the negotiability of bills of exchange; the law requires such evidence as may reasonably satisfy the minds of the jury; and if the arguments which we have heard to day, as to the necessity of the best evidence, were pressed at the trial, it was most proper for the Judge to guard the jury against any misconception on that point. Upon the whole, therefore, I think that the judgment given below was correct and must be affirmed.

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HOLROYD J. This appears to me to be a very plain case, nor have I been able to raise in my mind a doubt upon either of the points open to our consideration upon the bill of exceptions; nor upon the propriety of the direction given by the Judge, nor upon the finding of the jury, which indeed do not appear to be questions with which we are called upon to deal. The real question was, whether this evidence was or was not admissible, either as containing the declarations of persons who were not called as witnesses, or as having no tendency to prove the matters in issue. If the objection was known à priori, it should have been made before the evidence was given, but if it was not discovered until afterwards, then the Judge should have been requested to strike the evidence out of his notes, and if after that he persevered in summing it up to the jury, that would have been a good ground for tendering a bill of exceptions. But if, as appears to me to have been the case, the contention was whether, admitting

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the facts deposed to, they tended to prove the issue, there should have been a demurrer to the evidence. That the evidence was admissible, is clear, for reasons which I shall state very shortly after what has fallen from my Brother *Bayley*. The thing to be proved was, that the bill was indorsed by *E. S.* To establish that, the circumstance that the holder of the bill passed by the name of *E. S.* at *Cadix*, was *prima facie* evidence; and he did not pass by that name merely in the transaction of discounting this bill, but for other purposes also. If then there was any thing to shew that the name of the person indorsing was *E. S.*, *Mead v. Young* applies, and the defendant should have shewn that he was not the right *E. S.* I do not say that the mere possession of the bill would have been sufficient, but in addition to that he produced a letter, which was proved to be genuine, which would in all probability be given to *E. S.* The letter was not evidence of the facts stated in it, but was evidence that the party producing it passed at *Cadix* by the name of *E. S.* He remained ten days at that place, which was not like the conduct of a person committing a fraud or forgery. At the end of that time he puts the bill in question, together with

agree in all that has been said by my Brother *Bayley*, supposing the question to be open to us, but the bill of exceptions does not object to that direction.

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BEST J. The question appears so clear, that I certainly should abstain from saying any thing upon it, were it not for the importance of all matters touching the law of evidence. At first I entertained a doubt, whether the objection raised could be taken advantage of by bill of exceptions. The respective offices of bills of exceptions and demurrers to evidence have not been very distinctly understood, as appears by the judgment of *Eyre C. J.* in *Gibson v. Hunter*. (a) It appears to me now, that this objection is open on a bill of exceptions, but that the party making it should not be placed in a better situation than if he had demurred to the evidence. Bills of exceptions were not known to the common law, but were introduced by the 13 *Edw.* 1. c. 31. Until that time, if the judge decided wrongly upon any point of law, the suitor was without remedy. The statute was made to relieve parties from that hardship, it should therefore receive a liberal exposition; for which reason, although it appears to have been applicable originally to decisions upon pleadings only, (which at that time were carried on ore tenus,) yet I think it may fairly be extended to such a case as the present. In the 2 *Inst.* p. 427. Lord *Coke* says it extends to cases where any material evidence given to any jury is by the court overruled. I think we ought to go further, and say, that where there is not evidence to prove the issue to be tried, and the judge tells the jury there is, that is

(a) 2 *H. Bl.* 187.

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ground for tendering a bill of exceptions. But it may be asked what then is the office of a demurrer to evidence? It is this. If the party tenders a bill of exceptions, the evidence must be left to the jury; but if the party does not wish that, he may withdraw it from their consideration by a demurrer. If, however, he does not demur, he must not be placed in a better situation than if he did. Now, by a demurrer to evidence, all the facts of which there is any evidence are admitted, and all conclusions which can fairly and logically be deduced from those facts. Is there then any fact stated upon this record from which the jury might presume that the bill in question was indorsed by *E. S.*, the payee, supposing such fact to have been properly proved? If there be any one such fact, all question is at an end. Now I think that there is one fact shewing that the indorser was *E. S.*, putting all the other evidence out of the case, and admitting that the letter of *M^cDonnell* and Co. was not evidence, (although I concur with my Brother *Bayley* in thinking that it was properly received.) If a man comes to me having in his possession a letter brought from *York*, that is *prima facie* evidence that he brought it. Now, the person calling himself *E. S.* at *Cadiz*, produced there a bill brought from *Lisbon*, and which was the property of *E. S.*, that raises a presumption that he brought it from *Lisbon*, and from the mere possession, it might be inferred that he was the owner *E. S.* Had any proof been given that the bill had been lost, or improperly obtained from the owner, that would have rebutted the presumption. There was ample time to procure evidence of that, if the fact were so, but nothing of the kind was proved. It has been asked, however, whether

the possession of bills by clerks or bankers raises a presumption of ownership; certainly not, there the character of the holder rebuts the presumption. There is nothing here to rebut it, and therefore the proof given becomes cogent evidence. It was also urged, that the best evidence should always be given. The principle is correct, but the application wrong. Of every fact, you must have the best evidence that the party has within his reach, but when one fact is well proved, another may be inferred from it. From proof that a bill came from *London*, it may be inferred that the bearer brought it thence. From one act distinctly proved, a custom may be presumed in the absence of all conflicting testimony. (a) I agree also, that where there are several facts depending upon each other, if the evidence fails as to one, the whole falls to the ground. But here, all the facts are independent of each other, and I think the case may be rested upon the simple fact of the possession of the bill by the person who indorsed it. That certainly was evidence to be left to the jury, and in the absence of any thing to rebut the inference arising from that evidence, I think that their finding was correct. The judgment pronounced below must therefore be affirmed.

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Judgment affirmed.

(a) *Roe d. Bennett v. Jeffery*, 2 M. & S. 92.

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JOHN FORBES *against* Sir ALEXANDER INGLIS
COCHRANE, Knight, and Sir GEORGE COCK-
BURN, Knight.

Where certain persons, who had been slaves in a foreign country where slavery was tolerated by law, escaped thence and got on board a *British* ship of war on the high seas : Held, that a *British* subject, resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship for harbouring the slaves after notice.

THE declaration stated that the plaintiff was lawfully possessed of a certain cotton plantation, situate in parts beyond the seas, to wit, in *East Florida*, of large value, and on which plantation he employed divers persons, his slaves or servants. The first count charged the defendants with enticing the slaves away. The second count stated, that the slaves or servants having wrongfully and against the plaintiff's will, quitted and left the plantation and the plaintiff's service, and gone into the power, care, and keeping of the defendants; they, knowing them to be the slaves or servants of the plaintiff, wrongfully received the slaves into their custody, and harboured, detained, and kept them from the plaintiff's service. The last count was for wrongfully harbouring, detaining, and keeping the slaves or servants of the

cipally resident at *Pensacola* in *West Florida*. *East*
 and *West Florida* were part of the dominions of the
 king of *Spain*, and *Spain* was in amity with *Great*
Britain. The plaintiff, before and at the time of the
 alleged grievances, was the proprietor and in the pos-
 session of a cotton plantation, called *San Pablo*, lying
 contiguous to the river *St. John's*, in the province of
East Florida, and of about 100 negro slaves whom he
 had purchased, and who were employed by him upon
 his plantation. The river *St. John's* is about thirty or
 forty miles from the confines of *Georgia*, one of the
 United States of *America*, which is separated from *East*
Florida by the river *St. Mary*, and *Cumberland* island
 is at the mouth of the river *St. Mary* on the side next
Georgia, and forms part of that state. During the
 late war between *Great Britain* and *America*, in the
 month of *February*, 1815, the defendant, Vice-admiral
 Sir *Alexander Inglis Cochrane* was commander-in-chief
 of his majesty's ships and vessels on the *North American*
 station. The other defendant, Rear-admiral Sir *George*
Cockburn, was the second in command upon the said
 station, and his flag ship was the *Albion*. The *British*
 forces had taken possession of *Cumberland* island, and
 at that time occupied and garrisoned the same. The
Albion, *Terror Bomb*, and others of his majesty's ships of
 war, formed a squadron under Sir *George Cockburn's*
 immediate command off that island, where the head
 quarters of the expedition were. Sir *Alexander Cochrane*
 was not off *Georgia* during the war, and at the time of
 the capture of the island he was at a very considerable
 distance to the southward of *Cumberland* island, but Sir
George Cockburn was in correspondence with him while
 he was at the said island. In the year 1814, a pro-
 clamation

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clamation had been published by the said Sir *Alexander Cochrane* as such commander-in-chief, and Sir *George Cockburn* had received great numbers of copies thereof whilst the ships under his command were lying off the *Chesapeake*, and distributed them at the *Chesapeake* and amongst the different ships, but none were distributed by the order of the defendant, Sir *G. Cockburn*, to the southward of the *Chesapeake*, the southern extremity of which is full 400 miles distant from *Cumberland* island: The proclamation stated that it had been represented to him, Sir *A. Cochrane*, "that many persons then resident in the United States had expressed a desire to withdraw therefrom, with a view of entering into his majesty's service, or of being received as free settlers into some of his majesty's colonies; and it then notified, that all those who might be disposed to emigrate from the United States would, with their families, be received on board his majesty's ships or vessels of war, or at the military posts that might be established upon or near the coasts of the United States, when they would have their choice of either entering into his majesty's sea or land forces, or of being sent as free settlers to the *British* possessions in *North America* or the *West Indies*, where they would meet with all due encouragement." One of these pro-

came from *Seaward*, they were mixed with other refugees, and they all spoke *English*. On the 26th of the same month of *February*, Sir *George Cockburn* received from the plaintiff a memorial, stating, that the plaintiff had been a resident in the *Spanish* provinces of *East* and *West Florida* for nearly thirty years, as clerk and partner of a mercantile house established under the particular sanction of the *Spanish* government for the purpose of trade with the southern nations of *Indians*, and which they were allowed to continue by special permission from his *Britannic* majesty, pending the two *Spanish* wars that occurred during that period. The said mercantile house had acquired considerable property in these provinces, and particularly that the plaintiff possessed in *East Florida* a cotton plantation on the river *St. John's*, of which he was sole proprietor, and held the same with upwards of 100 negroes at the period of the invasion of the state of *Georgia* by his *Britannic* majesty's forces under the command of him, Sir *G. Cockburn*, in *January* preceding; that on the night of the 23d instant, sixty-two of his said negroes deserted from the plaintiff's plantation, (together with four others belonging to *Lindsay Tod* his manager,) of whom he had found thirty-four, namely, eighteen men, eight women, and twelve young children of both sexes, together with the aforesaid four negroes belonging to Mr. *Tod* on board of his majesty's ship *Terror*, Captain *Sheridan*. But that the said slaves refused to return to their duty, under pretence that they were then free, in consequence of having come to this island in possession of his *Britannic* majesty. The plaintiff therefore prayed, "that the defendant, Sir *G. Cockburn*, would order the said thirty-eight slaves to be forthwith delivered to him their lawful proprietor,

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proprietor, together with the boat which they had piratically stolen from his plantation." To this memorial a written answer was sent. A correspondence also took place between the *Spanish* governor of *East Florida* and Sir G. Cockburn relative to the desertion of slaves from the *Spanish* settlements. This correspondence was previous to Mr. Forbes's letter or memorial, and after the memorial the plaintiff had an interview with the defendant, Sir G. Cockburn, and claimed of him the slaves in question, then on board the *Terror Bomb*, as his property. Sir G. Cockburn told him he might see his slaves, and use any arguments and persuasions he chose to induce them to return. The plaintiff accordingly endeavoured to persuade them to go back to his plantation, and no restraint was put upon them, but they refused to go. The plaintiff then urged his claim very strongly to Sir G. Cockburn, and said he must get redress if he did not succeed in prevailing upon Sir G. Cockburn to order them back again, which Sir G. Cockburn said he could not do, because they were free agents and might do as they pleased, and that he could not force them back. They were victualled and subsisted with Sir G. Cockburn's knowledge whilst on board the *Terror Bomb*, and on the 6th *March* were removed

escaped from his catholic majesty's possessions in *East Florida*, where it is said they were slaves, and in consequence have been formally demanded by the governor and other claimants of *East Florida*. I have the honour to inform you, that under the circumstances attending these people, I do not consider myself authorised (without reference to his majesty's government) to decide upon the claims set forth by the governor and other persons in *East Florida*, and, as without such reference, it will be impossible for me to attend to any solicitation of their being given up, you will be pleased to cause the refugees in question to be put on board one of his majesty's ships going to *Bermuda*, to be reported to me on their arrival there, and I will take care to have them so guarded as to prevent their desertion, and to be forthcoming, should it be decided that they are to be returned to *East Florida*." In the same month of *March* Sir G. Cockburn sailed in the *Albion* with the said slaves on board for *Bermuda*, at which time he had received intelligence of peace between this country and *America*, and such slaves as belonged to *American* subjects, and were in the possession of the defendants, were not taken away in consequence of the wording of the treaty of peace. *Bermuda* is a *British* colony, 500 miles from *East Florida*, or any other land where slavery is acknowledged. The slaves in question were, on the 29th *March*, 1815, transferred by Sir G. Cockburn's orders, from his majesty's ship *Albion* into his majesty's ship the *Ruby*, at *Bermuda*, and after being on board that ship about twelve months, were landed in that island, and many of them employed in the king's dock-yard there. The slaves which were taken on board the *Albion*, and belonging to the plaintiff, were worth to him 3800*l*.

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1824. *Comyn*, for the plaintiff. The plaintiff had a property in his slaves, and having been deprived of that property by the act of the defendant, is entitled to maintain this action. Although, by the 47 G. 3. c. 36., the traffic in slaves has been declared unlawful in a British subject, the courts of this country still have respect to the trade itself when carried on by the subjects of a state which continues to tolerate it. *Fortuna* (a), *Donna Marianna*. (b) The trade is now considered *prima facie* illegal, and the burden of proof that it is not so, is thrown upon those who carry it on. *Amedie*. (c) If this be the law with respect to a trade which one branch of the legislature of this country (as appears by the preamble of the stat. 51 G. 3. c. 23.) has pronounced to be contrary to the principles of justice and humanity, à fortiori it must prevail with respect to the rights of property in slaves in the subjects of a foreign country, especially when it is considered that slavery is recognised by the legislature in our own *West India* islands. It is true, that in this country slavery does not exist; but an action is maintainable for the price of slaves in the courts of this country. In *Butts v. Penny* (d), trover was brought for ten negroes. Upon special verdict it appeared by an examination of the record, that

of property in slaves, in a country where slavery is allowed, will be recognised by the laws of this country. In *Smith v. Gould* (a), the action was brought for a negro wrongfully detained in a country where slavery was lawful. This distinction, also, was acted upon by the Court in *Smith v. Brown and Cooper* (b), and it is recognised in *Sommersett's* case. (c) These authorities fully establish that this plaintiff had a property in these slaves while in *Florida*. They made their escape and got on board a *British* ship, of which one of the defendants Sir G. Cockburn was the commander. He had notice that they were the property of the plaintiff, and *Blake v. Lanyon* (d) is an authority to shew that an action will lie for harbouring an apprentice, after notice that he is the apprentice of the plaintiff, and, by parity of reasoning, the present action is maintainable. The other defendant, Sir A. Cochrane, having concurred in the harbouring of these men, is also liable to be sued.

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Jervis, contra. It may be conceded, that, by the laws of a particular country, one man may have a property in others as his slaves, and that an action may be maintained by him in the courts of this country for an injury done to that property while such his property in the slaves continued. Here, all rights of the plaintiff over those persons (who in *Florida* had been his slaves) ceased the moment when they got on board the *British* ship of war. In *Sommersett's* case it was decided, that a person who had been a slave in one of our own settlements, and came to this country, and was here detained by a captain of a ship for the purpose of taking him

(a) 2 *Ld. Raym.* 1274.(b) 2 *Salk.* 666.(c) *State Trials*, Vol. 20.(d) 6 *T.R.* 221.

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back to such settlement, was entitled to be set at liberty, inasmuch as the law of *England* did not recognise the state of slavery. Lord *Mansfield* says, "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law." It is incumbent on the plaintiff in this case, therefore, to shew, that at the time when he demanded these slaves to be given up to him, they were his slaves by the positive law of the place where they then were. Now it is clear, that the law of *England* prevailed on board the *British* ship. *Madraso v. Willes* (a) is an authority upon that point, for in that case the *Spanish* law was recognised by our courts as prevailing on board the *Spanish* ship, and the slaves were, therefore, considered as property. By parity of reason, these persons who had been slaves ceased to be slaves the moment that they came on board the *British* ship, because, by the law of *England*, slavery is not allowed to exist. *Smith v. Brown and Cooper* (b), too, is an authority to shew, that, in order to maintain an action for the price of a slave, it must be shewn, on the face of the pleadings, that the parties were slaves by the law of the particular place where the sale took place. The right to property in slaves, therefore, is

slave to a place where slavery is unlawful, an action is not maintainable against another person for detaining or harbouring the slave, because there is no obligation on the latter to return to the service from which he has escaped.

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BAYLEY J. It is a matter of great satisfaction to me that this case, which is one of considerable importance, and of some novelty, may, at the option of either party, be turned into a special verdict. At present the impression upon my mind is, that the action is not maintainable. The cases decided in the Admiralty Courts are not applicable to the present. There certain persons had taken upon themselves to be active, and to seize ships having slaves on board, on the ground that they had a right so to do, either by the law of nations or the law of this country. The court of admiralty refused to assist the captors in condemning that property, to which the claimants, by the law of the particular country to which they belonged, had a right. In such cases the Court of Admiralty is called upon to act between the two countries upon a common principle applicable to both. That court, therefore, cannot lend its assistance in the condemnation of a vessel, on the ground that it is engaged in a traffic which, according to the municipal laws of the country to which the claimant belongs, is no wrong. The captain of the *Fortuna* had done no act that subjected him to condemnation by the laws of his own country, and this country had no right to say that he had been doing wrong, or that his property was subject to condemnation. In substance, therefore, the decision of that court operates only in the nature of an *amoveas manus* and no more. In *Madrazzo v. Willes*, the defendant had taken upon him-

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self to be active, and to seize the ship and slaves, and the court held that he had no right to make the seizure. Having thus disposed of the authorities referred to in argument, I now come to consider the question for our decision. My opinion in this case does not at all proceed upon the ground that slavery is not to be tolerated in the place where these slaves came on board; nor that an action, under circumstances, may not be maintained for enticing away or harbouring a slave: nor on the ground that the instant he leaves his master's plantation and gets upon other land, where slavery is not tolerated, that, ex necessitate, he becomes, to all intents and purposes, a free man. I give no opinion upon any one of these points; but I say that there is a great distinction between making the law of *England* active, and leaving the law of *England* passive. In the cases cited from the Admiralty Courts, the law of *England* was passive. Here we are called upon to put that law into activity upon the ground that the defendants have done a wrong. I am of opinion, however, that we are not warranted in coming to that conclusion, with reference to the character which the defendants at that time were filling. The ground of complaint alleged in the first count of

dence to shew that the defendants knew the slaves to belong to the plaintiff. But a very material allegation in all the counts is, that the defendants wrongfully did the act with which they are charged; the question is, whether that allegation was made out against either of the defendants? In *Blake v. Lanyon* the defendant must have had full opportunity of making inquiry, and satisfying himself whether that which was asserted on the part of the plaintiff was true or not. There could be no difficulty in ascertaining, with respect to a person in this kingdom, whether he was the servant of *A. B.* or not; but a captain of an *English* man of war, engaged in foreign service, has not the same means of satisfying himself upon such a fact. It might have been wholly inconsistent with the duties which he had to perform, in his character of a servant of the public, either to leave his ship, in order to make such enquiry himself, or to dispatch persons in that public service to enquire whether these slaves belonged to the plaintiff or not. Supposing, during the absence of any of the persons detached on such duty, an occurrence had happened which required the exertions of the whole crew, it would have been no excuse to the government of this country for him to say, that he had detached some of his crew to ascertain whether certain persons who had come to his ship, and had been claimed as slaves by several persons residing in different places, in fact belonged to them. It might happen that every one of the slaves came from different places, and belonged to different owners, and it would have been necessary to make inquiries at each place. In this case the ship was within one mile of the shore, but it might have been fifty miles off. I am of opinion

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that the defendants were bound to act *bonâ fide*. If it could be made out that they acted *malâ fide*, they would be liable to an action, but in order to support an action against a person who fills a public office like that which the defendants in this case filled, it is essential to shew that they acted *malâ fide*. In this case the plaintiff claims the slaves as his own, and desires that they should be dismissed from the defendants' ship and put into his possession. Sir G. Cockburn said that they might go if the plaintiff could persuade them to go; but they refused to go. It is said that Sir G. Cockburn ought have sent them away from his ship, but to what place was he to send them? they would refuse to go to *East Florida*, and if he was bound to give them a boat, they would have the option of going where they thought fit, and probably would have gone to *Cumberland Island*; but the plaintiff desired to have them put in his possession, not to have them set at large. Sir G. Cockburn was called upon to consider a nice question of law, upon which legal men might entertain a difference of opinion, viz. whether a man who is a slave, in a country where slavery is tolerated, continues a slave when he goes out of the limits of that state, and whether

of security, where they might be forthcoming for the benefit of the plaintiff, if the government should decide that they should be restored to him. It appears to me, therefore, that the character of *mala fides* does not attach upon either of the defendants in this case, and that being so, I am of opinion that they did not, in the language of this declaration, *wrongfully* harbour, detain, and keep the slaves. Their character, as public officers, placed them in a different situation from that in which other individuals would stand; and, upon that ground, I am of opinion, that the plaintiff is not entitled to maintain this action.

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HOLROYD J. I am also of opinion, that the plaintiff is not entitled to maintain the present action. The declaration alleges, that the plaintiff was the proprietor, and in the possession of a cotton plantation lying contiguous to the river *St. John*, in *East Florida*, on which land he employed divers persons, his slaves or servants. The plaintiff, therefore, claims a general property in them as his slaves or servants, and he claims this property, as founded, not upon any municipal law of the country where he resides, but upon a general right. This action is therefore founded upon an injury done to that general right. Now it appears, from the facts of the case, that the plaintiff had no right in these persons, except in their character of slaves, for they were not serving him under any contract; and, according to the principles of the *English* law, such a right cannot be considered as warranted by the general law of nature. I do not mean to say that particular circumstances may not introduce a legal relation to that extent; but assuming that there may be such a relation, it can only have a local

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local existence, where it is tolerated by the particular law of the place, to which law all persons there resident are bound to submit. Now if the plaintiff cannot maintain this action under the general law of nature, independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled. If he, being a *British* subject could shew that the defendant, also a *British* subject, had entered the country where he, the plaintiff, was domiciled, and had done any act amounting to a violation of that right to the possession of slaves which was allowed by the laws of that country, I am by no means prepared to say that an action might not be maintained against him. The laws of *England* will protect the rights of *British* subjects, and give a remedy for a grievance committed by one *British* subject upon another, in whatever country that may be done. That, however, is a very different case from the present. Here, the plaintiff, a *British* subject, was resident in a *Spanish* colony, and perhaps it may be inferred, from what is stated in the special case, that, by the law of that colony, slavery was tolerated. I am of opinion, that, according to the principles of the *English* law, the right to slaves, even in a country where such

say, that if the plaintiff having the right to possess these persons as his slaves there, had taken them into another place, where, by law, slavery also prevailed, his right would not have continued in such a place, the laws of both countries allowing a property in slaves. The law of slavery is, however, a law in invitum; and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country, without doing any wrongful act. This has been decided to be the law with respect to a person who has been a slave in any of our *West India* colonies, and comes to this country. The moment he puts his foot on the shores of this country, his slavery is at an end. Put the case of an uninhabited island discovered and colonized by the subjects of this country; the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail, until altered by the king in council; but in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children, as if they were treading on the soil of *England*. Now, suppose a person who had been a slave in one of our own *West India* settlements, escaped to such a country, he would thereby become as much a freeman as if he had come into *England*. He ceases to be a slave in *England*, only because there is no law which sanctions his detention in slavery; for the same reason,

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reason, he would cease to be a slave the moment he landed in the supposed newly discovered island. In this case, indeed, the fugitives did not escape to any island belonging to *England*, but they went on board an *English* ship (which for this purpose may be considered a floating island), and in that ship they became subject to the *English* laws alone. They then stood in the same situation in this respect as if they had come to an island colonized by the *English*. It was not a wrongful act in the defendants to receive them, quite the contrary. The moment they got on board the *English* ship there was an end of any right which the plaintiff had by the *Spanish* laws acquired over them as slaves. They had got beyond the control of their master, and beyond the territory where the law recognising them as slaves prevailed. They were under the protection of another power. The defendants were not subject to the *Spanish* law, for they had never entered the *Spanish* territories, either as friends or enemies. The plaintiff was permitted to see the men, and to endeavour to persuade them to return; but in that he failed. He never applied to be permitted to use force; and it does not appear that he had the means of doing so. I think that Sir *G. Cockburn* was not bound to do more than he did; whether he was bound to do so much it is unnecessary for me to say. It was not a wrongful act in him, a *British* officer, to abstain from using force to compel the men to return to slavery. It does not appear that he prevented force being used. I do not say that he might not have refused, but in fact there was no refusal. I have given my opinion upon this question, supposing that there would be a right of action against these defendants, if a wrong had actually been done by them, but I am by no means clear,

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ar, that even under such circumstances, any action
 ould have been maintainable against them by reason
 their particular situation as officers acting in dis-
 arge of a public duty, in a place flagrante bello. I
 nbt whether the application ought not to have been
 ide in such a case to the governing powers of this
 ntry for redress. The cases from the Admiralty
 arts are distinguishable from the present, upon the
 ounds already stated by my Brother *Bayley*. In *Ma-*
zzo v. Willes the plaintiff was a *Spanish* subject, and
 the law of *Spain* slavery and the trade in slaves being
 erated, he had a right, by the laws of his own coun-
 y, to exercise that trade. The taking away the slaves
 is an active wrong done in aggression upon rights
 en by the *Spanish* law. That is very different from
 quiring, as in this case, an act to be done against the
 ves, who had voluntarily left their master. When
 ey got out of the territory where they became slaves
 the plaintiff and out of his power and control, they
 re, by the general law of nature, made free, unless they
 re slaves by the particular law of the place where the
 fendant received them. They were not slaves by the
 w which prevailed on board the *British* ship of war. I
 a, therefore, of opinion, that the defendants are en-
 led to the judgment of the Court.

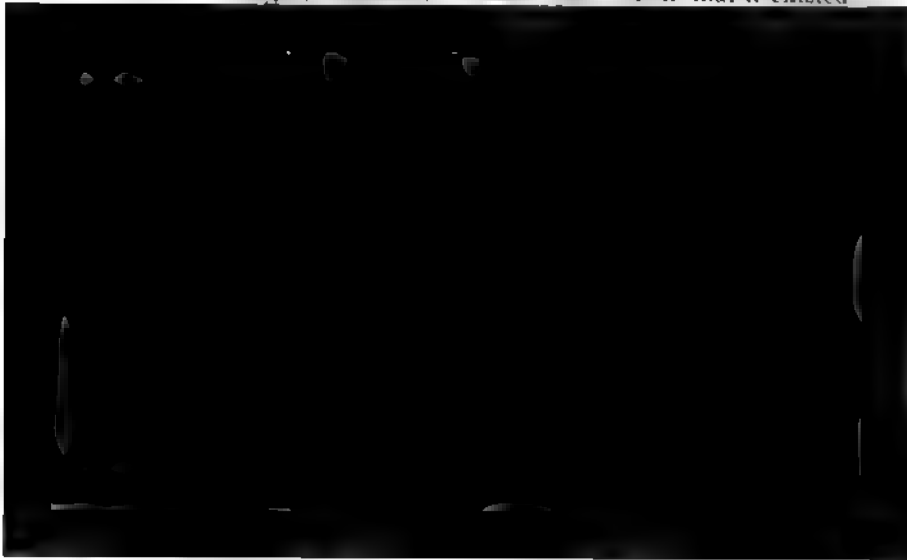
BEST J. The feelings which are naturally excited by
 discussion of the subject of slavery may perhaps be-
 ay me into some warmth of expression; I beg, how-
 er, that nothing which I say may be considered as
 enching upon the local rights of the proprietors of
 nds in our *West India* islands to the services of their
 ives in that country. They have acquired those
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rights under the encouragement of the legislature of this country, and they ought not to be put in jeopardy by any power in this country, unless a complete compensation be given to them by the public for the capital which they have been encouraged to embark in such property. The crime of slavery is the crime of the nation, and every individual in the nation should contribute to put an end to it as soon as possible. It is a relation which ought not to be continued one moment longer than is necessary to fit the slave for a state of freedom. For our convenience or our gain it ought not to be allowed to exist.

The plaintiff, in this case, states his rights in terms so general that possibly the declaration might have been bad upon demurrer, although it is sufficiently certain after verdict. It is incumbent upon us, however, to see what sort of servants the plaintiff claims. It is clear, from the case, that they were not servants in our sense of the word; that they were not servants by contract, but slaves. The first objection that occurs to me in this case is, that it does not appear upon the special case, that the right to slaves exists in *East Florida*. That right is not a general but a local right; it ought, therefore, to have been shewn that it existed



Then the question is, were these persons slaves at the time when Sir G. Cockburn refused to do the act which he was desired to do? I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a *British* man of war, not lying within the waters of *East Florida*, (where, undoubtedly, the laws of that country would prevail,) those persons who before had been slaves, were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognised by the local law, they have broken their chains, they have escaped from their prison, and are free. These men, when on board an *English* ship, had all the rights belonging to *Englishmen*, and were subject to all their liabilities. If they had committed any offence they must have been tried according to *English* laws. If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress. I think that Sir G. Cockburn did all that he lawfully could do to assist the plaintiff; he permitted him to endeavour to persuade the slaves to return; but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others; for if any force had been used by the master or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass against the persons using that force? Nay, if the slave, acting upon his newly recovered right of freedom,

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dom, had determined to vindicate that right, originally the gift of nature, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? That is substantially decided by *Sommersett's* case, from which, it is clear, that such would have been the consequence had these slaves been in *England*; and so far as this question is concerned, there is no difference between an *English* ship and the soil of *England*; for are not those on board an *English* ship as much protected and governed by the *English* laws as if they stood upon *English* land? If there be no difference in this respect, *Sommersett's* case has decided the present: he was held to be entitled to his discharge, and, consequently, all persons attempting to force him back into slavery would have been trespassers, and if death had ensued in using that force would have been guilty of murder. It has been said, that Sir G. Cockburn might have sent them back. He certainly was not bound to receive them into his own ship in the first instance, but having done so, he could no more have forced them back into slavery than he could have committed them to the deep. There may possibly be a dis-

slavery, it has done so within certain limits only; and I deny that in any case an action has been held to be maintainable in the municipal courts of this country, founded upon a right arising out of slavery. Let us look to the history of the odious traffic out of which the relation of master and slave in the *West Indies* has arisen. Queen *Elizabeth* expressed her hope to Sir *John Hawkins* that the negroes went voluntarily from Africa to submit to domestic slavery in another country, and declared, that if any force was used to enslave them, she doubted not it would bring down the vengeance of heaven upon those who were guilty of such wickedness. It is unfortunate, however, for the memory of that queen, that in her reign patents were granted to encourage the trade, and those were followed up by acts of parliament expressly recognising it. The legislature interfering from motives of humanity, regulated the mode of transporting slaves, and also the making of insurances upon them. An act was also passed soon after we had accomplished our own liberty, viz. the 9 & 10 *W. 3. c. 26. s. 7, 8, 9.* which certainly speaks of these unhappy beings by the degrading appellation of merchandize, and of their being brought to *England*, not as the termination of the voyage, but as a place at which ships might call. I think, however, that notwithstanding that act, if they had come here and got within the waters of *England*, they might have been discharged by means of writs of habeas corpus. There was also a statute passed in the reign of *G. 2. (a)*, by which slaves in the *West India* islands, like other property, were made saleable, and subject to the debts of the persons to whom they belong. Both those statutes, however, were local in their application, being

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confined to the *West India* islands only. I do not, therefore, feel myself fettered by any thing expressed in either of them, in pronouncing the same opinion upon the rights growing out of slavery, as if they had never passed. If, indeed, there had been any express law, commanding us to recognise those rights, we might then have been called upon to consider the propriety of that which has been said by the great commentator upon the laws of this country, "that if any human law should allow or injoin us to commit an offence against the divine law, we are bound to transgress that human law." (a)

There is no statute recognizing slavery which operates in the part of the *British* empire in which we are now called upon to administer justice. It is a relation which has always in *British* courts been held inconsistent with the constitution of the country. It is matter of pride to me to recollect that, whilst economists and politicians were recommending to the legislature the protection of this traffic, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency,

master and slave has been recognised in this country. I am aware of the case in *Levinz*, but there the question was never decided, and if it had, in the case of *Smith v. Gould*, the whole court declared that the opinion there expressed is not law. And the same had before been said by Lord *Holt* in the case of *Chamberlain v. Harvey*. (a) The case of *Smith v. Brown and Cooper* has been misunderstood. It has been supposed to establish the position, that an action may be maintained here for the price of a negro, provided the sale took place in a country where negroes were saleable by law. But that point was not decided. The court only held, that the question could not be agitated unless that fact was averred on the face of the declaration. In this case the slaves belonged to the subject of a foreign state. The plaintiff, therefore, must recover here upon what is called the *comitas inter communitates*; but it is a maxim, that that cannot prevail in any case where it violates the law of our own country, the law of nature, or the law of God. The proceedings in our courts are founded upon the law of *England*, and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the *English* municipal courts cannot recognise it. I take it, that that principle is acknowledged by the laws of all Europe. It appears to have been recognised by the *French* courts in the celebrated case alluded to by Mr. *Hargrave* in his argument in *Summersett's* case. Mr. Justice *Blackstone* in his *Commentaries*, vol. i. p. 42. says, "upon the law of nature and the law of revelation, depend all human laws; that is to say, no human law should be suffered to contradict

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(a) 1 *Ld. Raym.* 146.

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these." Now if it can be shewn that slavery is against the law of nature and the law of God, it cannot be recognised in our courts. In vol. i. p. 424., the same writer says, "the law of *England* abhors, and will not endure the existence of slavery within this nation;" and he afterwards says, that "a slave or negro, the instant he lands in *England*, becomes a freeman, that is, the law will protect him in the enjoyment of his person and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of *John* or *Thomas*, this will remain exactly in the same state as before;" and then, after some other observations which it is unnecessary to notice, he says, "whatever service the heathen negro owed of right to his master, by general, not by *local* law, the same (whatever it be) is he bound to render when brought to *England* and made a Christian." Whatever service he owed by the local law, is got rid of the moment he got out of the local limits. Now what service can we owe by the general law? Service to our country, service to our relations for the protection they have afforded us, and service by compact. A state of slavery excludes all possibility of a right to service arising by either of these means. A slave has no country, he is not reared

put down an usurpation against the rights of nature, but we had participated too largely in the iniquitous traffic to be justified in throwing the first stone, and may be considered as having paid this sum as a sin-offering for our transgressions. In *Sommersett's* case (a) Lord *Mansfield* observes, "The difficulty of adopting the relation without adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of *England*. We have no authority to regulate the conditions in which law shall operate." *Sommersett* was discharged. He might then have maintained an action against those who had detained him; and if that be so, how can any action be maintained against these defendants for not assisting in the detention of these men? The place where the transaction took place was, with respect to this question, the same as the soil of *England*. Had the defendants detained these men on board their ships near the coast of *England*, a writ of habeas corpus would have set them at liberty. How then can an action be maintained against these gallant officers for doing that of their own accord which, by process of law in a *British* court of justice, they might have been compelled to do? I have before adverted to the narrower ground upon which this case might have been decided, but if slavery be recognised by any law prevailing in *East Florida*, the operation of that law is local. It is an antichristian law, and one which violates the rights of nature, and therefore ought not to be recognised here. For these reasons I am of opinion, that our judgment must be for the defendants.

— Judgment for the defendants.

(a) 20 *Howell's St. T.* 79.

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BATES against CORT.

Declaration stated, that by agreement between plaintiff and G. G., plaintiff agreed to sell and deliver to G. G. a lace machine for 220*l.*; to be paid thus, 40*l.* on delivery, and the residue by weekly payments of 1*l.*, which were to be paid to defendant, as trustee for the plaintiff, and in case of any default, plaintiff was to have back the machine; and in consideration of the premises, and of plaintiff, at the request of the defendant, appointing him to receive the weekly

ASSUMPSIT on a special agreement. The first count of the declaration stated, that by a certain memorandum of agreement made between plaintiff and one G. G., the plaintiff agreed to sell and deliver, to G. G. a lace machine, then in a working condition, for 220*l.*, to be paid for as follows: 40*l.* to be paid on delivery, and 1*l.* per week thereafter until the full amount was discharged, with lawful interest; and it was thereby mutually agreed that the 1*l.* per week should be paid to the defendant, who was authorised to receive the same for the plaintiff as his trustee. And in case of default of G. G. paying the defendant 1*l.* per week, he should forfeit the whole money which might be then paid, and the machine should be returned to the plaintiff. And thereupon afterwards, to wit, on, &c., in consideration of the premises, and of the plaintiff, at the request of the defendant, appointing him to receive the said sum of 1*l.* per week for the machine from G. G.,

yet defendant, although requested, would not pay plaintiff the said arrears of 61*l.*, or any part. The second count, in like manner, set out the agreement, the promise of defendant, part performance, and subsequent default by G. G.; and then proceeded, “although the plaintiff did, on, &c., appoint defendant to receive the weekly payments, and hath always been willing to suffer him to receive them, and to take the said machine to and for his own use and benefit, of which defendant had notice, yet defendant would not pay the balance due from G. G. to the plaintiff.” Pleas, first, general issue; secondly, that the promise in the first count was to answer for the default of another, and that the only consideration for it, was the appointment of the defendant to receive the weekly payments, and that there was no agreement or memorandum thereof in writing signed by defendant, or any person duly authorised, wherein any other consideration was stated. Thirdly, a similar plea to the second count. The replication, after protesting that the promise of defendant, laid in the first count, was not for the default of another, and that the appointment of defendant was not the only consideration, set out an agreement in writing between the parties. Similar replication to the third plea. General demurrer and joinder.

Chitty, in support of the demurrer. The pleas seem to have been drawn with a view to found an objection on the seventeenth section of the statute of frauds; but the declaration is bad at common law, the promise as laid being void for want of consideration. *Forth v. Stanton*. (a) The appointment of the defendant to receive

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(a) 1 *Wms. Saund.* 210. and n. (2.)

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the weekly instalments is the only consideration alleged, but he was bound to pay the money over as soon as he received it; indeed the plaintiff might have sued him for it, without even making a previous demand. In *Baker v. Jacob* (a), it was held that an agreement "to forbear for a little while" was not a sufficient consideration; and *Elsee v. Gatward* (b) shews that a count merely setting out the non-performance of a promise, is not sufficient; it must also shew a consideration for the promise. (He was then stopped by the Court.)

Manning contra. The question certainly turns on the form of the declaration, not upon the subsequent pleadings; for if that be good, the pleas are clearly bad. The first count, perhaps, cannot be supported, but the second may; for however informally the facts may be stated on the record, yet, if upon the whole there appears to have been an undertaking by the plaintiff to let the defendant take the machine, that is a sufficient consideration for his promise. Now, upon such an agreement as that stated, an action would lie against the plaintiff for not suffering the defendant to take the machine.

chine, but that does not appear to have been in pursuance of any pre-existing agreement, nor does the whole import any obligation on the plaintiff to let the defendant take it. The declaration is therefore bad, no sufficient consideration for the defendant's promise being shewn.

Judgment for the defendant.

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THOMAS and Another, Assignees of R. HOBSON,
a Bankrupt, *against* HEATHORN.

ASSUMPSIT by the plaintiffs, as assignees of *Hobson*, a bankrupt. The first count of the declaration stated, that the defendant was indebted to the bankrupt before his bankruptcy, in the sum of 1000*l.* for goods sold, &c. and the promise was alleged to be made to the bankrupt before his bankruptcy. There were seven other counts, in each of which the sum mentioned as due was 1000*l.*, and in all these counts the promises were laid to have been made to the bankrupt before his bankruptcy. There was also another set of counts laying the promises to have been made to the assignees since the bankruptcy. The defendant pleaded, first, non-assumpsit to the whole declaration; and secondly, as to the first eight counts, that after the making of the promises in those counts mentioned, and before *Hobson* became a bankrupt, and before the commencement of the suit, to wit, on, &c. at, &c. an account was had and stated

Declaration in assumpsit by the assignees of a bankrupt stated that the defendant was indebted to the bankrupt before his bankruptcy in 1000*l.* for goods sold, &c., and concluded by stating that the plaintiff had sustained damage to that extent. Plea, that before the bankruptcy upon an account stated between the bankrupt and the defendant, the latter was found to be indebted to the bankrupt in the sum of 400*l.*, for which said sum the bankrupt drew a bill upon the

defendant, which the defendant accepted for and on account of the said several promises in the declaration mentioned, by reason whereof the defendant became liable to pay the bill. The plaintiff having replied over, it was held, upon demurrer to the replication, that the plea was bad, inasmuch as it was pleaded to the whole of the demand; and the giving of a bill for 400*l.* was not, in point of law, a satisfaction of 1000*l.*, the amount of the debt claimed.

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between *Hobson* and the defendant, of and concerning the sums of money in those counts mentioned; and upon such accounting, the defendant was found to be indebted to *Hobson* in the sum of 400*L.*, for which *said* sum of 400*L.*, *Hobson*, according to the usage and custom of merchants, made his bill of exchange, and directed the same to the defendant, and thereby required the defendant, three months after the date thereof, to pay to *Hobson* or his order the sum of 400*L.* for value received, and delivered the bill to the defendant, who thereupon accepted the same for and on account of the said several promises and undertakings in the said counts mentioned; and by reason thereof, the defendant became and from thence continually, until *Hobson* became a bankrupt, was liable to pay to *Hobson* or his order, and since the bankruptcy to the order of *Hobson* or the plaintiffs as his assignees, the money in the bill specified. Replication to the first plea joining issue; and to the second, that before *Hobson* became a bankrupt, to wit, on, &c. at, &c. when the bill was due and payable, it was duly presented to the defendant for payment, who was requested to pay the same, but that he did not pay the same either to the bankrupt or his

then unpaid in the possession, or under the control of the plaintiffs.

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Campbell, in support of the demurrer. The case of *Kearslake v. Morgan* (a) is an authority to shew that this plea is good. [*Bayley J.* There is this difference between the two cases. Here, this plea is pleaded to the whole demand contained in the first eight counts. There only to parcels of the demand.] This plea would be good upon general demurrer, and the plaintiffs having replied over, no other objection can be taken to the plea, except such as might be taken upon general demurrer. Now, the fair intendment of the plea is, that upon taking the account the defendant was indebted in no more than 400*l.*, and that that was the balance then due. The plea is certain to a common intent, which is sufficient upon general demurrer. [*Bayley J.* Then you must contend, that if issue had been taken upon the fact, whether more than 400*l.* was due, it would have been an answer to the whole plea.] It is also averred, that the bill was accepted for and on account of the promises in the declaration ; and in *Richardson v. Rickman* (b), the plea appears to have been pleaded to the whole demand. [*Holroyd J.* That does not sufficiently appear, nor was the objection ever taken.] Supposing the plea to be good on the face of it, this replication is insufficient, because it does not shew that the bill was still in the hands of the assignees. That fact being in the knowledge of the plaintiffs or the bankrupt, ought to have been averred by them. It does not ap-

(a) 5 *T. R.* 513.(b) *B. R. M.* 16 *G.* 3., cited in 5 *T. Rep.* 517.

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pear that the bill had not been negotiated, it may be inferred that it has, and that the defendant may be called upon to pay the debt a second time. The replication does not state by whom the bill was presented, nor that the bankrupt or his assignees ever required the defendant to pay it.

Holt, contra, was stopped by the Court.

BAYLEY J. I am of opinion that this plea is bad. It is perfectly clear, that a plea which professes to be an answer to the whole declaration, but which, in fact, is an answer to part only, is bad. Now, this plea professes to be an answer to the whole of the first eight counts of the declaration. What is the charge contained in those counts? Each count charges the defendant with a debt of 1000*l.*, and states that the plaintiffs have sustained damages to that amount. If they could have proved that they were damnified to that extent, they would have been entitled to recover the full amount. In answer to that demand, the defendant pleads that an account was stated between the bankrupt and himself, and that he, the defendant, was found to be indebted to the bankrupt in 100*l.* for which

1000*l.*, is a good discharge in law of the latter debt. But it is perfectly clear, that in point of law the payment of a smaller sum cannot be pleaded as a satisfaction for a larger. That being so, I am of opinion, that inasmuch as this plea is pleaded as an answer to the whole demand contained in the first eight counts of the declaration, it is bad, and that the plaintiffs are entitled to the judgment of the Court.

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HOLROYD J. I am of the same opinion. The correct way of pleading in this case would have been to say, as to all the sums of money except 400*l.* non-assumpsit, and then as to that sum, that the bill was given as stated in the second plea. Here the plea is, that the defendant upon accounting was found to be indebted in 400*l.*, and that the bill of exchange was given for that 400*l.* Now it is consistent with that allegation, that much more may have been due. The defendant may have been found to be indebted in 400*l.*, but it might not have been possible to ascertain at that time whether more was due or not. In the case of a plea of tender, the tender of the larger sum is a good answer to a demand for a smaller, on the principle *omne majus in se continet minus*; so a set off of a smaller sum is sufficient, because a part only may be set off. Here, the acceptance of the 400*l.* for and on account of the several promises and undertakings mentioned in the declaration extinguishes the debt claimed only to that amount. Generally speaking, the mere acceptance of a less sum is not in law any satisfaction of a greater sum. An agreement between a debtor and creditor, that part of a larger sum due should be paid by the debtor and accepted

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cepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole debt. But then the legal effect of such an agreement might be considered to be the same as if the whole debt had been paid, and part had been returned, as a gift to the party paying. Here, the plea is merely that the bill of exchange for 400*l.* was accepted in discharge of a debt of 1000*l.*, but that clearly is a bad plea, because the mere acceptance of 400*l.* does not necessarily operate in point of law as an extinguishment of the debt of 1000*l.* I am therefore of opinion, that the judgment of the Court must be for the plaintiffs.

BEST J. concurred.

Judgment for the plaintiffs.

See Mr. Stephen's Treatise on the Principles of Pleading, p. 233.

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BRITTEN and WILSON *against* WILLIAM WEBB.

THE first count of the declaration was upon a bill of exchange for 500*l.* drawn by the plaintiffs upon one *Francis Webb*, payable six months after date to their order, and accepted by him, which said bill was indorsed by the plaintiffs to *William Webb*, and re-indorsed by him to the plaintiffs. The declaration then averred, that at the time of the drawing of the said bill of exchange by the plaintiffs, and of the indorsement thereof by the defendant to the plaintiffs, it had been agreed by and between the plaintiffs and defendant, that the name of the defendant should be indorsed upon the said bill of exchange as a security to the plaintiffs for the due payment, of the said sum in the said bill of exchange mentioned, by the said *Francis Webb* to them, the plaintiffs; and that the said bill of exchange was so indorsed by the defendant under such agreement, and for such purpose only, to wit, on, &c. at, &c.; and that they, the plaintiffs, took and received such bill in satisfaction of such debt of the said *Francis Webb*, upon the faith and confidence that the said defendant would so indorse

Declaration upon a bill of exchange drawn by the plaintiffs upon one *F. W.*, indorsed by the plaintiffs to defendant, and reindorsed by him to the plaintiffs.

Averment, that at the time of the drawing of the said bill, and of the indorsement by the defendant to the plaintiffs it had been agreed between them that the name of the defendant should be indorsed upon the bill as a security to the plaintiffs for the due payment thereof by *F. W.*, and that the bill was so indorsed by the defendant under such agreement, and

for such purpose only, and that the plaintiffs took and received the bill in satisfaction of such debt of the said *F. W.*, upon the faith that the defendant would indorse the same as such security, and that the indorsement by plaintiffs was made without any consideration, and for the purpose only of procuring the indorsement of the defendant, and making the bill negotiable. Averment, that the bill was presented to *F. W.*, and that he refused to pay, and that notice of such refusal was given to the defendant, and he thereby became liable to pay, and being liable, promised: Held, upon demurrer, that this declaration was bad, inasmuch as, if the action was founded upon the bill, the plaintiff could only recover according to the custom of merchants, and by that custom the plaintiffs, as indorsers and drawers, would be liable to pay the amount of the bill to the defendant; and if the action was considered as founded upon the special contract, it was not maintainable, inasmuch as there was not any consideration for the defendant's indorsement.


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the same as such security as aforesaid; and that the indorsement so as aforesaid made by them the plaintiffs to the defendant, was made without any consideration received by them from the defendant, and for the purpose only of procuring the indorsement of the defendant and making the said bill of exchange negotiable, to wit, &c. The declaration then averred presentment to *F. Webb*, and refusal by him to pay and notice to the defendant of such refusal; and that the defendant by reason of the custom of merchants became liable to pay, and being liable, promised, &c. Breach, non-payment. To this count the defendant demurred.

Tindal, in support of the declaration, was called upon by the Court. It must be admitted, that, according to *Bishop v. Hayward* (a), the plaintiffs could not, as indorsees of the bill, maintain an action against the defendant founded merely on the custom of merchants. Because, the defendant, in the same character of indorsee, would be entitled to recover back again from the plaintiffs the identical sum which the latter claim in this action. But in that case it was admitted, that there might be circumstances which, if disclosed on the record,



ABBOTT C. J. I am of opinion that judgment must be given for the defendant. If this declaration be considered as founded upon the bill of exchange, the right of the plaintiffs to recover must depend upon the usage and custom of merchants. Now, according to that custom, the plaintiffs as indorsers and drawers would be liable to pay the bill to the defendant the indorsee, whereas the plaintiffs claim to receive the amount from the defendant. If on the other hand the action be founded upon the special contract, then they cannot recover, because it does not appear that there was any consideration for the defendant's indorsement. The plaintiffs could not have maintained any action against the defendant for not indorsing the bill according to his promise.

BAYLEY J. I am of the same opinion. This count is contradictory; it alleges, in the first instance, that the plaintiffs by their indorsement appointed the money to be paid to the defendant, and then that they did not appoint the money to be paid to the defendant, for that the indorsement was ineffectual. As to the special agreement, there was no consideration for it. Besides, the plaintiffs are not at liberty to set up a parol contract inconsistent with a written contract, and that would be the effect of enabling them to recover on this declaration against the defendant. For it appears by the bill of exchange, which was in writing, that the defendant was entitled to have the contents of the bill paid to him, whereas the effect of the agreement attempted to be set up, is to shew that it never was intended to be paid to him, but that he should be a surety for the payment of it to the plaintiffs.

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HOLROYD J. In support of the first count of this declaration, it is necessary to make out that the action is maintainable either upon the special agreement stated in that count, or upon the bill of exchange according to the custom of merchants. Now the action is not maintainable upon the bill of exchange according to the decision of *Bishop v. Hayward*, because that would produce a circuitry of action. That being so, then the action (if maintainable at all) must be founded upon the special agreement; but in order to make that agreement binding, some consideration ought to be shown. The declaration states that it was agreed between the plaintiffs and the defendant, that the name of the defendant should be indorsed upon the bill as a security for the payment of the money by *Francis Webb*, the latter being indebted to the plaintiffs. It does not appear, therefore, that there was any consideration moving from the plaintiffs to the defendant to induce him to indorse the bill. That being so, the agreement was void, and the judgment must be for the defendant.

Judgment for defendant.

MILLMAN *against* PRATT.

Where, in case for slander of title, it appeared by the declaration that the plaintiff had a certain interest in the premises,

and that by an agreement between himself and the defendant, (from whom he derived that interest,) he had a clear right to dispose of the whole of that interest, but only a doubtful right to dispose of any portion of it; and the plaintiff averred that he put up *his said interest* to auction, and that defendant published a libel of and concerning his right to sell the *said interest*; the evidence being, that he offered for sale a portion of that interest only: Held, that this was a fatal variance.

CASE for slander of title. The declaration stated, that before the time of committing the grievances complained of, *M. W.* and *H. L.* were lawfully possessed of certain premises for the residue of a certain term of

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ninety-nine years, commencing *March 25th*, 1791, which premises had been assigned by defendant to them in trust to sell the same; and that thereupon, and before, &c. the said premises were conveyed by indenture by the said *M. W.* and *H. L.* and defendant, to the plaintiff, for the residue of the said term. And by a certain agreement made, at the same time as the last mentioned indenture, between plaintiff and defendant, it was agreed that defendant at certain times, and upon certain terms, (particularly set out in the declaration,) should be at liberty to repurchase the premises. “Provided also, and it was by the said agreement expressly agreed and declared between the parties thereto, that in case the plaintiff should at any time thereafter be under the necessity of selling the premises, he should be at liberty so to do, upon giving the defendant six months notice in writing, of his intention, unless the defendant should, in the meantime, pay him the sum of 1600*l.* for the repurchase of the premises.” The plaintiff then averred, that he was under the necessity of selling, and gave defendant six months notice of his intention, who did not, in the meantime, pay 1600*l.* or any part thereof. The declaration then set out certain proceedings in Chancery, whereby it appeared, that the defendant had obtained an injunction to restrain the plaintiff from selling, which was afterwards dissolved; and then proceeded, “By reason of all which premises, the plaintiff before the time of committing, &c. had good and sufficient right, title, power, and authority to sell and dispose of the said premises; and having such good right, &c. afterwards, to wit, on, &c. caused the *said interest* of him, the plaintiff, of and in the premises, to wit, all the residue and remainder of the said term of ninety-nine years then to come and unexpired therein, to be, and

1824. the same then and there was put up and exposed to sale
by public auction. Yet defendant knowing the premises,
and that the right of plaintiff to sell the said interest in
the said premises had become and was absolute, and
that he had good right to sell the same, but intending
to injure the plaintiff, to slander his title to the said
premises, to prevent persons from bidding for and pur-
chasing the said interest of the plaintiff in the said
premises, and to hinder and prevent the plaintiff from
disposing of the same, afterwards, and just before, and
upon the exposure to sale of the said interest of the said
plaintiff in the said premises, to wit, &c. falsely, &c.
published a libel of and concerning the title of the
plaintiff to the said premises, and of and concerning his
right to sell *his said interest* therein, in the form of a
notice, (the declaration then set out the libel with in-
nuendoes.) By means of the publication of which libel,
persons desirous of purchasing were hindered and pre-
vented from bidding for *the said interest* of the plain-
tiff in the said premises." At the trial before Ab-
bott C. J., at the *Westminster* sittings after last *Trinity*
term, it appeared in evidence that the interest which
the plaintiff had put up to auction was not the residue of

damages. It was sufficient to shew a right to dispose of the premises, and an attempt to do so, then the defendant committed an injury by saying that the plaintiff had no right to sell. [*Holroyd J.* The declaration has this allegation, "Whereby the plaintiff was prevented from selling *the interest aforesaid*;" that refers to the whole interest which he had, and he never intended to sell that.] The allegation implies that the plaintiff was prevented from selling any part of his interest, and proof of being prevented from selling any part sustained the action; for this being in tort, it was not necessary to prove the quantity of that interest as laid, *Ricketts v. Salwey*. (a)

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ABBOTT C. J. This appeared upon the face of the record to be an action against a party who was interested in the premises, and not a mere wrong doer. The declaration disclosed a clear right in the plaintiff to sell the whole interest in the premises, if necessary, but a doubtful right to sell any partial interest. I thought at the trial, and still continue of the same opinion, that the defendant ought to have had an opportunity of putting that question on the record. But he would have been deprived of that right had it been held that the declaration in its present form was satisfied by the evidence given. I think, therefore, that the nonsuit ought not to be set aside.

BAYLEY J. concurred.

HOLROYD J. The declaration alleges the libel to be of and concerning the plaintiff's right to sell *the said*

(a) 2 B. & A. 360.

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interest. Is the grant of an underlease the sale of any thing? The sale of a thing existing is very different from an agreement for money to create a thing de novo. Now, although the whole cause of action laid need not be proved, still the proof must be of the same ground of action pro tanto.

BEST J. concurred.

Rule discharged.

Marryat and Bayley were to have opposed the rule.

DOE dem. HARRIS *against* MASTERS.

Where a lease contained a proviso that, if the rent was in arrear for twenty one days, the lessor might re-enter, "although no legal or formal demand should be made."

EJECTMENT to recover possession, for non-payment of rent, of a certain chapel called *Spring Garden Chapel*, situate in *Spring Gardens*, in the parish of *Saint Martin in the Fields*, in the county of *Middlesex*. At the trial before *Abbott C. J.* a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case. The lessor of the plaintiff, *James Harris*,

and the 25th day of *March*, without deduction, except as therein after mentioned; the first half yearly payment to be made on the 29th day of *September* then next ensuing; and the said Defendant did, amongst other things, covenant with the said *James Harris*, that he would pay the reserved rent on the days and times appointed by the lease for the payment thereof. The lease contained also the following proviso, " Provided always, and it is hereby declared and agreed by and between the said parties hereto, and these presents are upon this express condition, nevertheless, that in case the said rent shall be behind or unpaid for the space of twenty-one days next after the respective days, whereon the same respectively are hereinbefore appointed to be paid as aforesaid, although and notwithstanding no formal or legal demand shall be made for payment thereof; that then and in such case, it shall and may be lawful for the said *James Harris*, into and upon the said hereby demised premises, or any part thereof, in the name of the whole wholly to re-enter." On the 25th day of *March*, 1822, the second half year's rent became due, which not having been paid, or offered to be paid, *Mr. Harris* brought this ejectment, laying the demise therein on the 26th day of *April* last. No demand was made on the part of the said *James Harris* of the rent, nor was any formal re-entry made for breach of the covenant, and there was sufficient distress on the premises to countervail the arrears of rent.

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Abraham for the plaintiff. This case is not to be decided by the common law, or by the 4 G.2. c. 28., but by the special provision in the lease, that the lessor should be

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at liberty to re-enter for non-payment of rent, although no formal or legal demand should have been made. In *Dormer's* case (a) it is said, that "by special consent of the parties re-entry may be for default of payment of rent without demand of it." So in *Goodright v. Cator* (b), a proviso for re-entry for non-payment of rent, "although no demand thereof should be lawfully made," was held to dispense with any demand at all.

Curwood, contra. It is stated in the case that no demand of the rent was made, and that there was a sufficient distress on the premises. Now the Court will construe the lease strictly, as this action is brought to take advantage of a forfeiture. At common law great niceties were to be observed in making a demand of rent, and the stipulation in this lease, "that no legal or formal demand should be necessary," was intended to relieve the lessor from those niceties, but not from the necessity of making any demand. Then there was no re-entry: it will be said that bringing the action was sufficient, but the contract must be construed strictly, and that only gives a right of re-entry.

Per Curiam. It has been decided in many cases that an actual entry need not be proved in such a case as this. As to the other point, *Dormer's* case and *Goodright v. Cator* are decisive. By the covenant in this lease, the defendant has dispensed with all such demand as the law would otherwise have required.

Postea to the plaintiff.

(a) 5 Cu. 40.

(b) 2 Doug. 477.

In *Hilary* term and before execution, a rule nisi was obtained for staying all proceedings in the ejectment, upon the defendant's bringing into Court the arrears of rent claimed, and 100*l.* to answer the costs, in order that the master might compute what was due for rent and costs, and that such sum should be paid to the lessor of the plaintiff; against which,

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Abraham shewed cause, and relied upon *Roe dem. West v. Davis* (a), as shewing that the application being after a trial, was too late.

Curwood, contra, contended that this was not a proceeding under the 4 G. 2. c. 28., but an application to the discretion of the Court, for an indulgence which was frequently granted under similar circumstances before that act passed.

Per Curiam. In *Roe v. Davis* Lord *Ellenborough* says, "It may perhaps be true, that before the statute a practice obtained in this Court of relieving the tenant up to the extent contended for: but it appears by the words of the act, that the legislature only meant to legalize that practice to a certain extent, viz. upon the application of the tenant *before* trial. If, therefore, we were now to extend the same relief to him *after* trial, we should be exercising the function of legislation instead of judicial construction, and should depart from the line which the statute has drawn." That case is expressly in point, and we approve of the principle upon

(a) 7 *East*, 363.

which

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which it was decided; this rule must therefore be discharged.

Rule discharged.

FREEMAN against ARKELL.

In an action for maliciously, and without probable cause, charging plaintiff with an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, and that he delivered them at the court of quarter sessions to the clerk of the peace or his deputy. The clerk of the peace stated that a bill of indictment for the assault was preferred, and

DECLARATION stated, that the defendant falsely and maliciously, and without any reasonable or probable cause, went before one *J. Timbrell*, being a justice of the peace for the county of *Gloucester*, and falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having violently assaulted and taken from his person, the precept of two justices which he was about to execute, and upon such charge procured the said *J. Timbrell* to grant his warrant for apprehending the plaintiff. It then stated that the plaintiff was apprehended and taken before the justice, &c. &c. Plea, not guilty. At the trial before *Park J.* at the last assizes for the county of *Gloucester*, *Dr. Timbrell* the magistrate, before whom the charge was made, was called as a witness on the part of the

he did not know where the information was, but it was not in his possession. *Edward Bloxam* the clerk of the peace stated, that he had received many papers from *Dr. Timbrell* at the *Easter* sessions, but he could not find any but recognizances; that an indictment had been presented to the grand jury on behalf of the defendant, but that it was returned *ignoramus*, and it was usual on such occasions to throw away or destroy the papers relating to the charge. It was insisted on the part of the plaintiff that this was sufficient evidence to shew that the original papers were lost or destroyed, and that parol evidence of the contents was admissible. The learned Judge was of opinion, that as *Dr. Timbrell* said he had delivered the information to *Mr. Bloxam* or his deputy, the latter ought to have been called to prove that the examination was either destroyed or not to be found; and, consequently, that it was not sufficient evidence of the destruction or loss of the document to let in parol evidence of the contents. A rule nisi for a new trial was obtained in *Michaelmas* term by *Pearson*, on the ground, that under the circumstances proved, parol evidence was admissible.

Jervis and *Russell* now shewed cause, and contended, that the plaintiff ought to have called the deputy of *Mr. Bloxam* to shew that the depositions which were taken in writing were not in his custody. If they had done so, and he had stated that he had searched among his papers and could not find them, there would have been sufficient evidence to raise a presumption that they were lost or destroyed. Here it is consistent with the evidence of *Dr. Timbrell* and *Mr. Bloxam*, that the written depositions may be in existence and in the possession of the deputy of the latter.

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BAYLEY J. It was decided in *Brewster v. Sewell* (a), that where a paper is useless; so that its loss or destruction may reasonably be presumed, very slight evidence of its loss and destruction is sufficient to let in secondary evidence; and I am of opinion, that in this case, the plaintiff did enough to let in the secondary evidence, for he subpoenaed Dr. *Timbrell* who took the information, and who, therefore, ought to have had it if it was not returned to the sessions, and Mr. *Bloxam* the clerk of the peace, in whose custody it ought to have been if it had been returned to the sessions. Dr. *Timbrell* stated, that he had delivered it at the sessions to the clerk of the peace, or his deputy at the table. Now, the clerk of the peace was the person to whom such papers ought to have been returned for the purpose of being produced to the chairman of the magistrates at the quarter sessions. If it were delivered to the deputy, it was his duty to deliver it to *Bloxam*, and the plaintiff had a right in that case to expect that *Bloxam* was in possession of that document. He stated, that when a bill of indictment is thrown out, it is usual to throw away the information as useless. That certainly is not a prudent course to adopt, but still the evidence is, that such was the practice.

Dr. *Timbrell* and Mr. *Bloxam*, used due diligence to get the original document which was the best evidence. If there were no other evidence, as to what had become of the original depositions than that given by Mr. *Bloxam*, I think it would not be sufficient to let in the secondary evidence; for then it might be said, that the plaintiff might have enquired of Dr. *Timbrell* whether he had delivered in the depositions or not. Dr. *Timbrell* however states, that he delivered them at the sessions either to Mr. *Bloxam* or his deputy, and he speaks of both being at the table at the time when they were delivered. Now if they were delivered to the deputy, they were delivered to him as the agent of *Bloxam*, and they were delivered not for his own purposes, and therefore, are not to be presumed to be among the private papers of the deputy, but among those papers which ought to be in *Bloxam*'s custody as clerk of the peace. Mr. *Bloxam* states that he had searched among those papers and could not find the information. Now, inasmuch as the depositions ought to have been in his custody if they existed, and he had searched and could not find them; I think that the plaintiff had done sufficient to let in the secondary evidence, and to rebut all suspicion that he had recourse to the secondary evidence, because that might make for him when the primary evidence would make against him.

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BEST J. Secondary evidence is not to be admitted until a party has taken all reasonable pains to obtain the primary evidence. The degree of trouble to be taken for that purpose depends upon the nature of the instrument. If the instrument be of value, or of such a nature that the reasonable presumption is, that it is
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in existence, stricter evidence is required in order to shew that it is destroyed or lost. If it be an instrument of no value, then the reasonable presumption being, that it has been destroyed or lost, slight evidence only of its destruction or loss is required. That principle is fully established by the case of *Brewster v. Sewell*. Now it is impossible, that the plaintiff in this case should have any interest in keeping back the original information. Then has he taken all reasonable pains to procure the best evidence. In the first place, in whom ought the possession of such an instrument to be? It appears that it is not the practice in cases of misdemeanors to return these informations to the assizes or sessions. It is not required by law. The plaintiff delivered to Dr. *Timbrell* a subpoena duces tecum, commanding him to produce the original depositions. He ought to have told the plaintiff then that he could not comply with that subpoena, but without being told that, the plaintiff goes further and subpoenas the clerk of the peace. The plaintiff, therefore, provided himself with the testimony of the person who ought to have had the depositions if they were not returned to the sessions, and of the person who ought to have had them if they had been returned. If the deputy of Mr. *Bloxam* received them, he received them for his master, and in due course would have placed them among his papers, and not being found among them, the fair presumption is, that they are lost or destroyed.

Rule absolute.

Campbell and *Godson* were to have argued in support of the rule.

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RICHTER *against* HUGHES.

DECLARATION in replevin for taking plaintiff's goods. The defendant avowed, as collector of rates imposed by 51 G. 3. c. 134. entitled, "An act for erecting a chapel of ease at *Islington*," for several assessments upon the plaintiff duly made by the trustees for the purposes mentioned in the act. The avowry stated a demand by the defendant upon the plaintiff, that he was summoned before a magistrate for non-payment, and upon default warrants were issued, under which distress was made. Plea in bar, that by the act, under and by virtue and for the purposes of which the said

By a local act for building a chapel, the trustees therein mentioned were authorised to appoint a treasurer, clerk, and other officers, and out of the monies to be received by virtue of the act, to pay such salaries to them as they (the trustees) should think reasonable, and out of the same fund they were


to pay to the curate a yearly salary, not less than 150*l*. They were authorised to borrow any sum at interest, not exceeding 30,000*l*., which monies so borrowed, and the interest thereof were to be made payable out of the burial fees, and out of the rates and assessments to be made in pursuance of the act. They were also authorised to grant annuities, provided the money so raised by annuities did not exceed the whole sum intended to be raised for the purposes of the act. They were authorised also to make an assessment on the occupiers of houses, lands, &c. within the parish, not exceeding 2*s*. 6*d*. in the pound on the yearly value, and the rates were to be applied by them to the purposes of that act during such time as any of the monies to be borrowed upon the credit of the act should remain unpaid, or the annuities granted should have continuance; and by another clause, the trustees were empowered to take a distress for nonpayment of the rates. The trustees appointed under this act raised a sum of 32,636*l*., partly by annuity and partly by borrowing upon common interest; and made a rate to pay the annuities and the interest upon the whole money borrowed. A distress having issued, the plaintiff replevied, and the defendant avowed, as collector of the rates imposed by the act. The plaintiff, after setting out several clauses in the act of parliament, pleaded, that before the making of the assessment, the trustees had wrongfully borrowed more than the sum of 30,000*l*., which by the act they were authorised to do, viz. 136*l*. by annuities, and 2500*l*. by borrowing, and that the rates were made, amongst others, for the purpose of paying the said annuities and money borrowed. Replication, that the burial fees were insufficient to answer the purposes of the act, and that the annuities granted by the act were in existence, and that it was necessary for the trustees to raise money by assessments, in order to carry into effect the purposes of the act, and that the assessments were duly made pursuant to the act, and without stating that the rates were made for the purpose of paying the annuities and money borrowed, or any other purpose whatever: Held, upon demurrer, that the plaintiff was entitled to judgment, inasmuch as the act of parliament only authorised the trustees to borrow a specific sum, and the rate having been made to pay the interest due upon the whole sum borrowed, was bad in toto, although the defect did not appear upon the face of it.

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assessments or rates were made, it was enacted that it should be lawful for the trustees to erect and build a chapel, with vaults under the same for the burial of the dead, and also to enclose a sufficient quantity of ground for a cemetery or burial ground thereto; that the trustees were empowered to borrow any sum of money necessary for the purposes of that act, not exceeding in the whole the sum of 30,000*l.*, which monies so to be borrowed, and the interest thereof, were thereby charged upon, and made payable from time to time out of the fees and sums of money which should be received by the collector for the time being, on account of the burials in the said burial ground, and out of the rates and assessments to be made in pursuance of that act: and for securing the repayment of the money so to be borrowed, and the interest thereof, the said trustees in manner therein mentioned were authorised to assign over the same fees and sums of money, rates, and assessments, to persons advancing and lending such money from time to time, and when they should judge necessary to grant annuities to any person who should contribute, advance, and pay unto the said trustees, any sum of money for the absolute purchase of any annuity,



able in respect to burials or interments of the dead in the said new chapel or burial ground, would be insufficient to answer the purposes of that act; and then enacted, that it should be lawful for the trustees to make assessments or rates upon all the then present and future tenants and occupiers of any house, buildings, &c. within the parish, according to yearly improved value of the premises, and as the same were ascertained and rated in the poor-rate books of the said parish for the time being, and not exceeding the sum of 2s. 6d. in the pound of the yearly value of such buildings, lands, &c.; and which rates or assessments should be paid quarterly, and the same when received, were thereby vested in the trustees in trust, to be applied by them for the purposes of that act, for and during such time as any of the monies to be borrowed upon the credit of that act should remain due, or any of the annuities to be granted in pursuance or by virtue of that act, should have continuance and no longer. (a) Averment, that before the making of the said several assessments and rates in the avowry mentioned, the said trustees had wrongfully, without any lawful authority, and in excess and abuse of the powers and au-

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(a) Besides the clauses of the act set out in the plea, the following sections were referred to in argument. The seventh section, by which the trustees were authorised to appoint a treasurer, clerk, and collectors, and such other officers and persons as they (the trustees) should think proper, and out of the monies to be received by virtue of the act, to allow and pay such salaries, wages, and allowances to those officers as they (the trustees) should think reasonable. Section 26., by which the trustees were authorised, out of the fees and rates, to pay every year to the minister or curate any sum not less than 150l. Section 30., by which the trustees were authorised, out of the same fund, to pay to the clerk of the chapel for his salary such sum as they should think proper.

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thority given to them by the act, raised by way of annuity, and by borrowing a sum much beyond the said sum of 30,000*l.*, which sum and no more they were by the said act authorised and empowered to raise either by annuities or borrowing, to wit, the sum of 30,136*l.* by annuities, and the sum of 2500*l.* by borrowing, and exceeding by 2636*l.* the sum they were by the said act empowered to raise as aforesaid; that the said several assessments and rates in the avowry mentioned were made, for, among other purposes, the purpose of paying the said annuities, and the said money so borrowed as aforesaid, and which so exceeded the sum by the said act authorised to be raised as aforesaid, and so wrongfully raised as aforesaid. And that the said rates or assessment in the said avowry mentioned, were not made for the purposes and according to the said act, but were each illegal and void. Replication, that at the time of making the assessments or rates in the avowry mentioned, the fees payable in respect of burials in the chapel and burying-ground were insufficient to answer the purposes of the act; and that divers annuities granted in pursuance of the act then had continuances, and that, at the time of making the rates, it was necessary

mentioned respectively, pursuant to the powers vested in them by the act, without specifying any purpose for which such assessments or rates were so made; and that none of the said assessments or rates were by the title thereof, or otherwise expressed to be made for any such purposes as in the plea mentioned; and that the said rates and assessments were respectively made pursuant to the powers vested in the trustees by the act, and were in fact made for, amongst other purposes, the purpose of paying the annuities so lawfully granted under and by virtue of the said act of parliament, and so then continuing. To this replication the plaintiff demurred.

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Chitty was to have argued in support of the demurrer, but the Court called upon

Parke, contra. It is admitted upon these pleadings that the trustees have raised 2636*l.* beyond 30,000*l.* Now, assuming that it was illegal for them to raise money to be appropriated to the payment of the excess above that sum, still the rate on the face of it was good, and the collector had a right under this act of parliament to take the distress. In cases of this description the question has always been, whether the rate on the face of it appears to have been made for legal or illegal purposes, *Rex v. Hardy* (a), *Rex v. Brograve*. (b) If it be for legal purposes the rate has been held to be good, even though the money raised may have been likely to be misapplied. In *Rex v. The Mayor and Burgesses of Gloucester* (c), the rate

(a) *Cowp.* 579.(b) 4 *Burr.* 2491.(c) 5 *T. R.* 346.

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was for more than it ought to have been, for the act under which it was made empowered the making of a rate to reimburse existing overseers their reasonable expences, but the rate was really for raising a sum to reimburse former overseers; the court, however, held themselves bound by what appeared on the face of the rate itself, and decided that it was good. Here, the trustees have the power of making a rate, provided it shall not exceed 2s. 6d. in the pound. But the rate is not rendered bad because there may have been an intention on the part of the trustees to apply a small part of the money raised to illegal purposes. It is admitted upon the pleadings, that the rate was duly made; that the burial fees were insufficient to answer the purposes of the act; that annuities were in existence; and that it was necessary for the trustees to raise money by assessments, to carry into effect the purposes of the act; and that the purposes mentioned in the plea were not mentioned in the assessments; it was, therefore, a good rate upon the face of it. Although the trustees have, in fact, raised more money than they were authorised to do, that, according to the authorities, is no objection to the

trustees are authorised by the act, in the first place to raise a definite sum by loan or annuity, and then to raise by rate so much money as will be sufficient to pay either the common or annuity interest upon the sum borrowed, together with such sum as is sufficient to pay the salary of the clergyman.] The sum which the trustees are empowered to borrow is definite and specific, but that which they are authorised to raise by rates is indefinite. By the seventh section they are authorised out of the monies to be received under the act, to pay such salaries, &c. to the treasurer and other officers as they shall think reasonable. The sums are indefinite ; there is no limitation, therefore, to the sums which they are authorised to raise. They are authorised to raise money for a variety of purposes, and those purposes include the interest of a specific sum. Although they have borrowed more than that sum, still the rate has been raised for the purposes of the act, and that is sufficient. The only limitation put upon the rate in the clause empowering the trustees to make it is that it shall not exceed the sum of 2s. 6d. in the pound.

BAYLEY J. The question in this case arises upon the validity of a rate made under the provisions of a local act of parliament passed for a specific purpose. That act empowers the trustees to borrow money, and to raise money by rates for certain purposes specified. One of those purposes is to keep down the interest of money borrowed ; and they are entitled to raise money either by borrowing or by way of annuity ; but their power of borrowing is limited, for the sum borrowed is not to exceed the sum of 30,000l. The act of parliament,

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therefore,

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therefore, gives a special power, and that power ought to be strictly followed, and as it authorises them to borrow a certain sum of money, and afterwards, by rates, to pay the interest of the money borrowed, they have no right to borrow beyond the specified amount, or to raise rates to pay interest upon any higher sum. It has been argued that, as the trustees are authorised to raise money by assessments, and that as the payment of interest is not the only purpose to which the money is applicable, the rate is a good rate, and that the intention of the trustees to misapply part of the money, does not render the rate invalid, but only gives the party upon whom the rate is to be levied, a right of appeal or of action, if the money raised should be misappropriated. It appears to me, however, that there is this fallacy in that argument. The vice, instead of being in the disposition or appropriation of the money, is in the original raising of the money; for the quantum of the rate is increased by including in the amount this which I call illegal interest, and therefore the rate is void in toto. The trustees had a power to raise 30,000*l.* only, and they would have to pay therefore the interest on that sum, besides certain salaries. Then they would have a right to raise as much more as might be requisite for the payment of these salaries; but beyond that they have no right to go. There is a material distinction between this case and that of *Rex v. The Mayor and Burgesses of Gloucester*. There, the money to be raised was for the relief and support of the poor. The expence would vary from day to day; it is necessary in such cases to raise money prospectively, so that there may be always some in hand, in order to meet whatever demands

mands may occur. The power of making rates for the poor is not confined to certain limits, but as much money is to be raised as the overseers think fitting and necessary. The objection in that case was, that the parties meant to misapply a part of the money, and it was held that that did not make the rate bad in toto, upon the ground that the parties were warranted in raising a sum of money to the full amount of what they did raise. In the present case, on the other hand, the parties were not warranted in raising money to the amount which would be raised by this rate. It is this circumstance which, in my opinion, makes the rate bad in toto, and the warrant bad in toto. The party upon whom the distress has been levied was liable to contribute only an aliquot part of the sum authorised to be raised by the act. In this case the plaintiff was rated and distrained upon for more than he was by law liable to pay, and the defendant had no authority so to distrain upon him. There are cases in which it has been held that if, under a warrant of distress, more be claimed of a party than he is liable to pay, the warrant is bad in toto. For these reasons, it seems to me that the distress was illegally taken, and that the plaintiff is entitled to the judgment of the Court.

HOLROYD J. I am of opinion that this rate is bad. The cases which have been cited are very different from the present. In *Rex v. The Mayor and Burgesses of Gloucester*, a general power was given to the persons who were to make the rate, to make such a rate as in their judgment they should think fit and proper for the maintenance and relief of the poor. The objects of that

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rate were of necessity all in prospectu. It was not intended to pay any monies borrowed, or due, or becoming due. Now the present rate was not for any thing in prospectu, but to pay debts already incurred, with respect to monies borrowed either upon interest or annuity, or with respect to monies due to the clergymen or the officers. Those sums were to be paid out of the monies raised or otherwise received under the authority of the act of parliament. Now, taking the general purport of the act as it appears from its enactments, and especially adverting to the words of the thirty-fifth section, it seems to me that these trustees had a power to raise certain monies for the purpose of paying the interest of the original sum which they were authorised under the act to raise, and likewise of paying the salaries mentioned in the act; but those were not matters in prospectu. The money to be raised was to be applied to the payment of money already actually borrowed, or then actually due, and therefore could not be for payment of salaries afterwards to become due, and not due at the time of making the rate. These trustees must know that, if they borrow beyond the sums which they are empowered to borrow under the act of parlia-

BEST J. The question raised by the pleadings in this case is neither more nor less than this, viz. whether a party who has a limited authority under an act of parliament, may come forward and avow that he has abused the provisions of the act, and at the same time pray to be protected. It appears that the trustees had a power to raise the sum of 30,000*l.*, and that they have actually raised 32,656*l.* They have made a rate to pay the interest of the larger sum, and the distress in this case issued in order to levy that rate. The plaintiff resists the distress, on the ground that the trustees have wrongfully borrowed 2656*l.* beyond the sum of 30,000*l.*, which the act authorises them to borrow, and that this circumstance has made their rate illegal and void; and the answer to this plea of the plaintiff is, that the rate was expressly made for the purpose of covering such illegal excess; for it is admitted that the trustees have borrowed more than they were entitled to borrow; but they say by the pleadings, that at the time of making the assessment, the burial fees were insufficient to answer the purposes of the act, and that the annuities granted by the act were in existence; that it was necessary to raise money by assessments, in order to carry into effect the purposes of the act, and that the assessments were legally made, and were stated so to be made according to the purposes of the act, and without specifying any purpose for which they were made. The substance of the answer is, that the rate, on the face of it, appears to be for legal purposes, but that it is not made by legal authority; for where the authority is a limited authority, can it be any justification to say that, being empowered to raise only a certain sum, they have in fact levied more? *The King v. The Mayor and Burgesses*

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Burgesses of Gloucester is distinguishable, because there, the money was properly raised in the first instance. The ground of the decision in that case was, that the money having been properly raised, it was not competent for the Court to quash the rate because the money might be misapplied. But here the money was not properly raised, for it was raised for the purpose of being applied to a purpose not contemplated by the legislature. But it is said that this should have been made the subject matter of appeal, but if that which has been done, has been done without authority, it is null and void. If the act done by the trustees had been legal, and the money had afterwards been misapplied, that undoubtedly would have been a proper subject for an appeal; for then they would have been justified in raising the money, but not in its application. But here it is distinctly admitted in the pleadings that the first act was illegal. I am therefore of opinion that this rate was not raised for the purposes contemplated by this act of parliament, and that the distress which was issued to enforce it was illegal, and that our judgment must be for the plaintiff.

Judgment for the plaintiff.



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PHILLIPS *against* BISTOLLI.

ASSUMPSIT for goods sold. Plea, non-assumpsit.

At the trial before *Abbott C.J.* at the *Middlesex* sittings after *Hilary* term, 1823, the following appeared to be the facts of the case. The plaintiff was an auctioneer, and in *July*, 1822, had put up for sale, among several other articles, a pair of ear-rings, the property of a jeweller, described in the catalogue as brilliant top and drop ear-rings; one of the conditions of sale was, that the purchaser should pay 30 per cent. upon being declared the highest bidder, and the residue of the price before the goods were removed. The defendant was a foreigner, and did not fully understand the *English* language; but he was in the habit of attending the plaintiff's sales, and purchasing goods. On the day in question he attended, and bought several lots, and the ear-rings in question were knocked down to him as the highest bidder, at the price of 88 guineas. They were immediately delivered to him, and he received them without making any objection. After they had been in his hands three or four minutes, a person who interpreted for him said to the plaintiff that the defendant had bid for the lot in question under a mistaken idea that the price at which it was knocked down to him was 48 guineas. The plaintiff said that the last bidding had been mentioned three times. The defendant then returned the ear-rings. The plaintiff, however, refused

By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to *A.*, as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: Held, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other.

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to take them back, but said he would keep them on defendant's account. It appeared further, that if they were *Assyrian* garnets, they would be worth about 50*l.* only, but if they were rubies, they would be worth the price at which they were knocked down. And it was doubtful, upon the evidence, whether they were rubies or garnets. It was objected, on the part of the defendant, that there was no acceptance of the goods by him so as to take the case out of the statute of frauds. The Lord Chief Justice, however, was of opinion that there was a sufficient acceptance, provided that the defendant was under no mistake when he bid the 88 guineas, and left it to the jury to find whether the defendant was mistaken in the price at the time when he bid the 88 guineas, and the jury having found that there was no mistake, a verdict was entered for the plaintiff. In last *Easter* term a rule nisi was obtained by *Scarlett* for a new trial, upon the ground that there was no acceptance, inasmuch as the plaintiff had a lien upon the goods until the price was paid, and he could not therefore have intended to part with the possession of the goods. In order to satisfy the statute of frauds there must be a delivery by the vendor, with the intention of parting

as owner. *Chaplin v. Rogers.* (a) *Blenkinsop v. Clayton.* (b)

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Gurney and *Comyn* now shewed cause. It is sufficient to satisfy the statute of frauds if the defendant for a single moment accepted the goods. *Carter v. Tous-saint.* (c) Here they must have been delivered by the vendor with the intention of vesting the right of possession in the vendee as owner. [*Holroyd J.* Then you say that the vendee would have had a right to take the goods away, although the auctioneer had insisted upon the price being first paid.] The plaintiff waived his right to the payment of the price or the deposit, by delivering the goods. Here, upon the evidence, it appears at least that the goods were delivered to the defendant as owner, that he received them without objection, and that he kept them in his possession for three or four minutes. There was therefore an acceptance by him as owner during that interval.

Per Curiam. In order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner. It lies upon the plaintiff in this case, to make out that there was such delivery and acceptance. Now, here by the printed conditions of sale, a deposit of 30 per cent. was to be paid upon the party being declared the highest bidder, and the residue of the purchase-money when

(a) 1 *East*, 192.(b) 1 *B. Moore*, 328.(c) 5 *B. & A.* 855.

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the goods were removed; and it is not to be presumed that the vendor intended, contrary to that condition, to part with the right of possession until the deposit or price was paid. There was, therefore, very slight evidence to shew that the plaintiff intended to part with all control over the goods when he delivered them. Then was there any acceptance by the defendant as owner? It appears that a very short interval elapsed after the lot was knocked down, before the defendant objected that he had been mistaken in the price. Unless, therefore, the retaining of them for the three or four minutes that intervened, was evidence of an actual acceptance by him as owner, it is clear that there was not any acceptance afterwards. That, at all events, was very slight evidence of an acceptance by the defendant as owner, and it ought at least, under all the circumstances, to be submitted as a question of fact to the jury, whether there was a delivery by the vendor and an actual acceptance by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other.

Rule absolute.

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LOARING *against* STONE.

TRESPASS for taking and detaining the plaintiff's horse. At the trial before *Burrough J.* at the Summer assizes, 1823, for the county of *Devon*, the jury found a verdict for the plaintiff, damages one shilling, subject to the opinion of this Court on the following case.

By a local act of the 47 G. 3. "for repairing and improving the road from the *Honiton* turnpike road near *Yard Farm*, in the parish of *Lepottery*, in the county of *Devon*, to the *Ilminster* turnpike road near the village of *Horton*, in the parish of *Ilminster*, in the county of *Somerset*," trustees were appointed with power to erect toll gates. By section 10. it was enacted, "that the several tolls hereinafter particularly mentioned, shall be demanded and taken at each of the said toll gates or turnpikes which shall be erected in pursuance of this act, (except as hereinafter expressly directed or provided to the contrary,) before any horse, cattle, or beast, upon which any toll is by this act imposed, shall be permitted to pass through the same, (that is to say :) For every horse, mare, gelding, or other beast drawing in any coach, chariot, barouche, chaise, curricule, landau, berlin,

By a turnpike act, a toll of 4½d. was imposed upon every horse or other beast drawing any coach or other carriage, for every horse drawing singly any carriage, the same toll; for every horse drawing any waggon or other such carriage drawn by two horses or more, the sum of 3d.; for every horse laden or unladen, and not drawing, the sum of 1d. The statute then provided that no person should be liable to pay toll more than once in any one day at any toll gate for passing and repassing in any one day with the same horses and carriages through the same, but all persons having paid toll

once, and producing a ticket denoting the payment of such toll, were afterwards to pass and repass with the same horses and carriages toll free during the same day. A stage coach, drawn by four horses, passed through a gate erected under this act of parliament, and paid the toll. In the evening of the same day, a different coach, called by the same name, belonging to the same proprietor, driven by the same coachman, and drawn by the same four horses, but carrying different passengers and different parcels for hire, passed through the same gate: Held, that a second toll was payable in respect of this carriage and horses.

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calash, hearse, or other carriage, the sum of $4\frac{1}{2}d.$: for every horse, mare, gelding, or other beast drawing singly or alone, any carriage of any description whatsoever, the sum of $4d.$: for every horse, mare, gelding, or other beast drawing any waggon, wain, cart, or other such carriage drawn by two horses or beasts of draught, or more, the sum of $3d.$: for every horse, mare, gelding, mule, or ass, laden or unladen and not drawing, the sum of $1d.$ ” By section 18. “No person or persons shall be liable to pay toll more than once at any one toll gate or turnpike to be erected by virtue of this act, for passing and repassing at any time or times in any one day (to be computed from twelve of the clock at night to twelve of the clock in the succeeding night) with the same horse or horses, cattle, beasts, and carriages through the same toll gate or turnpike ; but, that all and every person and persons having paid toll once as aforesaid, and producing a ticket denoting the payment of such toll, (which ticket the collectors of the tolls are hereby required to give gratis on receipt of the toll,) shall afterwards pass and repass with the same horse or horses, cattle, beasts, and carriages, toll free during the

same day through the same toll gate or turnpike and so

day through all the other toll gates or turnpikes to be erected in and upon these roads." By section 13. "If any person shall refuse to pay the toll after demand thereof made, it shall be lawful for the toll collector to seize and distrain any horse, cattle, or beast, upon which any toll is imposed by this act." Under this act toll gates have been erected, and among others one called the *Devon* gate, to which the defendant on the 11th *April*, 1823, was the keeper and toll collector. On that day the *Bath* and *Exeter* subscription coach, driven by one *William Wager*, (as servant of the proprietors,) drawn by four horses, and carrying passengers and parcels for hire, passed through the *Devon* gate in its way from *Exeter* to *Bath*. The toll of 1s. 6d., being 4½d. for each horse, was paid by the driver on passing through the said gate, and a ticket denoting the payment of the tolls was given by the defendant to *W. Wager*. In the evening of the same day, a different coach called by the same name, and belonging to the same proprietors, driven by the same coachman, and drawn by the same four horses, but carrying different passengers and different parcels also for hire, passed through the same gate on its way from *Bath* to *Exeter*; the driver, *W. Wager*, produced a ticket which had been given to him in the morning, but the defendant insisted on taking a second toll of 1s. 6d.; and upon the driver's refusing to pay this second toll, the defendant took one of the horses from the coach, and retained it until the sum of 1s. 6d. was paid to him by the driver *W. Wager*. The gate called the *Devon Gate*, is within the county of *Devon*, and the horse so taken was the property of the plaintiff, *Loaring*, one of the proprietors of the coaches.

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Fraser, for the plaintiff. Here the toll is imposed by

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the enacting clause upon horses only, and upon horses drawing as well as those not drawing. It appears by the proviso, that the legislature thought that it was sufficient for the purposes of the trust, that for the same thing, and on the same day, one toll only should be payable. The exemption ought to be construed as commensurate with the toll, and as the toll is imposed upon horses drawing as well as upon horses not drawing, the exemption of "horses" in the proviso cannot be considered as confined in its application to horses not drawing, *Gray v. Shilling*. (a) Indeed it seems probable that the word "carriages" was inserted in the clause in order to shew, that the exemption was meant to extend to horses drawing carriages as well as to others. Here, at all events, taking the two clauses together, it is by no means clear that the toll is due, and it is incumbent upon those who seek to impose a burden upon the public to shew that their claim rests upon clear and unambiguous language. *Lceds and Liverpool Canal Company v. Hustler*. (b)

Adam contrà was stopped by the Court.

BAYLEY J. This case does not admit of any reasonable doubt. All cases of this description depend upon the manner in which the act of parliament is worded. Tolls are imposed in consideration of the injury done to the roads by the horses and carriages passing over the same. The degree of injury depends on the manner in which the horses are employed. Now, in this case, the enacting clause imposes, first, a toll of $4\frac{1}{2}d.$ upon every horse drawing in any coach, chariot, &c.; secondly, a

(a) 2 B. & B. 30.

(b) 1 B. & C. 424.

similar

similar toll upon every horse drawing singly any carriage whatever; thirdly, a toll of 3*d.* upon every horse drawing any waggon or other such carriage drawn by two horses; and, fourthly, a toll of 1*d.* upon every horse not drawing. The toll is therefore imposed upon the horse, and not upon the carriage; but then by the eighteenth section, no person is to pay toll more than once at any one gate for passing and repassing in any one day with the same horse or horses and carriages, but every person having paid toll once, and producing a ticket, shall afterwards pass and repass with the same horse or horses and carriages, toll free. Now, as no toll was imposed by the enacting clause upon the carriage, there could be no reason for introducing that word into the proviso, unless it were intended to confine the exemption in respect of horses drawing carriages to the same horses drawing the same carriage; and it may be very reasonable that the exemption should be limited to that case, for otherwise the same horses, with a different hired chaise, and with different travellers, would be exempt from the payment of toll.

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HOLROYD J. I am of the same opinion. The act imposes the toll upon horses, according to the manner in which they are employed. By the enacting clause, toll would be payable in respect of every horse every time it passed the gate. The party, therefore, claiming the exemption must shew that he comes within the terms of the proviso. Now here the plaintiff cannot bring himself within the proviso, unless some of the words contained in it be altered, or rejected altogether. The word "carriage" occurs several times in the proviso, and accompanied with such other words as shew

1824. clearly that there must be both the same horses and the same carriage, in order to entitle a party passing the gate a second time to the exemption.

Loaring against Stone.

BEST J. concurred.

Judgment for the defendant.

CATHERINE MARTHA MELLISH *against* WILLIAM MELLISH, EDWARD MELLISH, and THOMAS MELLISH.

A. being seised in fee of an estate called *H.*, subject to a mortgage for years, by his will, (in which there was a statement in figures of the amount of the estimated value of his entire property, of the sum which his wife had brought him on his marriage, and of the sum which he himself had settled upon his marriage, and of the estimated value of the estate at *H.*,) directed that

THIS case was sent by the Lord Chancellor for the opinion of this Court.

John Mellish being seised to him and his heirs in fee simple of a capital messuage and other hereditaments, situate in the county of *Hertford*, and known by the general name of *Hamels*, subject to a mortgage for a term of years, made his will, which was duly executed by him, and of which the following is an exact copy and imitation, both in words and figures: that is to say,

| | | |
|----------------------|-----------------------|-----------|
| Marriage settlement, | £ 12,500 <i>C. P.</i> | £ 120,000 |
| Do. | 25,000 <i>J. M.</i> | <hr/> |
| | 37,500 | 120,000 |
| Hamels | 45,000 | 80,000 |
| | <hr/> | <hr/> |
| | 80,500 | 40,000 |

his daughter *C. M.* should have the disposal of the sum which he himself had settled on his wife, and in case she did not dispose of it, that it was to go to certain persons therein named. He then desired that *H.* should go to his daughter *C. M.* as follows: in case she married and had a son, to go to that son; in case she had more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she had but one daughter or no child at that time, he desired it might go to his brother *W. M.* He then gave specific legacies nearly to the amount of the sum which remained, after deducting the money settled on his marriage and the value of the estate at *H.* And he directed that his daughter should pay an annuity to a person therein named for life; and then he made his brother *W. M.* his sole legatee: Held, that *C. M.* took an estate in tail male in *H.*, with a reversion in fee, subject to the other estates created by the will.

Catherine

Catherine Mellish to have the disposal of the 25/m.; in case she does not dispose of it, I wish it to go to as follows: 5/16 *W. M.*, 5/16 *E. M.*, 3/16 *T. M.*, 3/16 *A. G.*

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The mortgage on *Hamels* to be paid off as soon as *William Mellish* can do it without prejudice to the business. *Hamels* to go to my daughter *Catherine Mellish* as follows: in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother *William Mellish*.

| | | |
|-------------------|--------|--------------------|
| * <i>C. H. M.</i> | £ 5000 | (£ 5000. |
| <i>W. M.</i> | 10,000 | * These initials |
| <i>E. M.</i> | 7000 | mean my daughter, |
| <i>A. G.</i> | 5000 | my three brothers, |
| <i>J. M.</i> | 5000 | and my sister. |
| <hr/> | | |
| 30,000 | | |

- * £ 500 *J. L. Bonhote.*
- 200 *Dessoulary.*
- 200 *Mouchet.*
- 40 £ 40. *Bentley, Miss S. Salmon* £ 200.
- 50 *J. Bonhote.*
- 20 *Macdonald.*

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I give as follows:)

* I desire that one thousand pounds of the three thousand pounds left her may be paid to my daughter, immediately on my decease.

Mrs Pinfold to receive 200*l.* a year from *Catherine Mellish*, during the life of *Mrs. Pinfold*; a year's wages to all my household servants, and likewise to *Webster*, and I desire mourning may be given to all my servants, the same as at my dear wife *C. M.*'s death. I leave my dear brothers *W. M.*, *E. M.*, and *J. M.*, my sole executors and guardians of my child *Catherine Mellish*, and I leave my brother, *William Mellish*, my sole legatee.

The testator departed this life on or about the 9th day of the month of April, 1798, without having re-

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voked or altered his said will, leaving the said *Catherine Martha Mellish*, in the said will called *Catherine Mellish*, the plaintiff, his only child, and heir at law. The question was, what estate and interest the said *Catherine Martha Mellish* took in *Hamels*.

Preston, for the plaintiff. *Catherine Mellish* took, under the will, an estate in tail male in *Hamels*. This construction will best answer the general intention of the testator; any other construction would place this property in a line of enjoyment contrary to his will. The first object of the testator's bounty is his own daughter. In contemplating her marriage he also provides for a son of the daughter; he does not name that son as an individual, but as a class, the word son being descriptive of all the male line. If the daughter take only an estate for life, it would follow as a consequence, that if she had one son and several daughters, and, during her life, the son died, leaving a son, the grandson would be excluded by a daughter; and if the inheritance be suspended until her death, and is to vest only at that period, and she left a grandson and no son, then the grandson could not take; and if there be more than one daughter, at her husband's death, or her own death, and no son, the property would go to the eldest daughter, in exclusion of a grandson; and if there be only one daughter, and no son at that period, the estate would go to *William Mellish*. Therefore, if *Catharine Mellish* had several daughters, and one son, and he had a son, and died in his mother's life-time, the eldest of the daughters would take in preference to the grandson; and if *Catherine Mellish* had, at her death, only one daughter, but a grandson, descending from a son, *William Mellish* would take,

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take, and the grandson be excluded. Such an intention is not to be imputed to the testator, unless the Court are, by the express language of the will, compelled to give that effect to the will. It may be laid down as a general rule, that where a man devises to *A.* an estate for life, with remainder to his son or sons, then in favour of the intention of the devisor, (unless it be clear from the language of the will that the son is to take *co nomine*, as purchaser) the word *son* or *sons* will be construed collectively and as descriptive of all the male descendants, as a class, and the devise will give to *A.* an estate of inheritance in tail male. *Catherine Mellish*, the parent, does not take an estate in fee. From the peculiarity of the language of the will, her daughter might take as purchaser, because the general intention will not allow the parent to take an estate in tail female. Sons, however, and more remote descendants, being males descended from males, will take through the medium of being the heirs and descendants of *Catherine Mellish*, their parent. But what difficulty is there in deciding that the daughter of *Catherine Mellish* may take as purchaser, although the sons are to take by descent, through the medium of their parent. In *Wight v. Leigh* (a) the devise was to *A.* and after his death to his *first and other sons*, and in default of male issue, then to his eldest and other daughters, and to their heirs male for ever, and it was held that *A.* took an estate in tail male. In *Wharton v. Gresham* (b) the testator devised all his estates, as well real as personal, to his nephew *Anthony Wharton*, and to his *sons* in tail male; and for want of such issue male to his brother captain *John*

(a) 15 Ves. 564.

(b) 2 Bl. Rep. 1083.

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Wharton, and to his sons in tail male, and in failure of such issue male, then to his right heirs. It was held that *J. Wharton* took an estate tail. The word *sons* was construed as a collective term, giving by that word the inheritance to the first or immediate devisee. In *Chorlton v. Craven* (a) the devise was to *Thomas Chorlton* during his life, with remainder to his first son in tail male lawfully begotten, severally and successively, (not saying to the second, third, fourth, and other sons,) and for want of such issue either of his son *T. C.* and his son *J. C.*, then he devised the estate to his daughters and their children, share and share alike, to be held to them and their heirs for ever, as tenants in common, and not as joint tenants. It was held that *Thomas* was tenant in tail. This case was so decided by the Court of King's Bench on a case sent from the Court of Chancery, and the certificate of the King's Bench was confirmed by the Lord Chancellor. The Court of Exchequer, in *Trinity* term, 1823, on the same will came to the same decision, and in each case the decree was against a purchaser. There is another class of cases which establish that the word *son* may include all the descendants. In *Souder's* case (b), *Souder*

issue male, then his son *Thomas* to have the house; if *Thomas* married, having a male issue of his body lawfully begotten, then his son to have the house after his decease; if he had no issue male, then to his son *Richard* in like manner, totidem verbis, and so to *Daniel* totidem verbis; and then he added this clause, "if any of his sons or their heirs male, issue of their bodies, went about to alien or mortgage the house, then the next heir to enter." It was resolved that an estate in tail male was created for three reasons, first, because the testator says, "if he hath no issue male, his next son to have it," which was as much as to say, "if *William* dies without issue male," which words were sufficient to create an estate tail in him. Secondly, the last clause, "if any of his sons or their heirs male, issue of their bodies, go about," &c., which explains the first words, that the male shall be heir and take by descent. Thirdly, the thing prohibited proved it; for if the sons only took an estate for life, this restraint would have been idle. In *Wyld v. Lewis* (a), the testator devised to his wife *Elizabeth* all his lands, &c. not settled in jointure. The devise was general; and then the testator said, "if it shall happen that my wife shall have no son or daughter by me begotten on the body of the said *Elizabeth*, and for want of such issue, then the said premises to return to my brother *John Wyld*, if he shall be then living, and his heirs for ever, only paying to his two brothers (*A.* and *B.*) the sum of 150*l.* within one year after the decease of the said *Elizabeth*;" and it was held, that the wife took an estate tail; and in that case the Lord Chancellor observed, that the inclination to avoid the ab-

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(a) 1 Atk. 432.

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surdity of excluding the grandchildren had been the principal reason for construing words of the singular number, and which are properly descriptive of particular persons only, in a collective sense, as including the descendants of the first taker. Also in *Robinson v. Robinson* (a), the devise was to *A. B.* for his life and no longer, and after his decease, to such son as he should have, lawfully to be begotten, taking the name of *Robinson*, and in default of such issue, then to the testator's cousin and his heirs for ever; and it was held by the Court of King's Bench, and afterwards in the House of Lords, that *A. B.* took an estate tail. The effect of that decision was, that the words "*son* lawfully to be begotten," was a collective term, and included all the descendants in the male line. It therefore described all descendants of the person to whom the gift was originally made. If the word *son* be *nomen collectivum*, as taking in the whole class, it is a word of limitation, and not a word of purchase. (b) These authorities shew that Miss *Mellish* took an estate in tail male, since otherwise the gift would be so narrowed as to produce great inconveniences; for if she took merely for life, her husband would be excluded from all benefit, though she died leav-

a male descendant, he and his male descendants should take in exclusion of a daughter, and that *William Mellish* should not take as against a son or more remote male descendant of Miss *Mellish*, or the eldest of two or more daughters, if there should be several daughters.

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Tindal, contra. The fee either descended to *Catherine Mellish*, or it was devised to her by the will defeasible in three events; the first was, if she married and had a son, it was then to go to that son; secondly, if she had more than one daughter and no son, it then was to go to the eldest daughter; and, thirdly, if she had no child at all, it was to go to *William Mellish*, the testator's brother. These are executory devises, to take effect according to the rules applicable to that subject; and so that *William Mellish* might be entitled to the estate in fee. It may be conceded, that at the present time, and before the happening of any of these events, the fee is vested by descent in *Catherine Mellish*; for, whether the beneficial interest is to be given to her *for life*, with contingent remainders to the son, daughter, and *William Mellish*, in succession, or whether it is intended to be given her in fee with executory devises; in either case the fee is, in the meantime, in *Catherine Mellish*; for it is a general rule, that where a remainder of inheritance is limited in contingency by devise, the inheritance, in the meantime, if not otherwise disposed of, remains in the heirs of the testator, until the contingency happens to take it out of them. *Fearne*, 351. Therefore, if *Catherine Mellish* took an estate for life, with contingent remainders to her son, &c., the fee would be in her until the contingency happened. The question will be, whether

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whether the testator has given her a particular estate, different from the fee which has descended to her, with contingent remainders, or whether the limitations to the son, daughter, and *William Mellish* are executory devises in defeasance of the fee simple which has come to her either by descent or by the devise. Now the latter is most consistent with the general intention expressed by the testator. No intention is manifested by him to divide the fee simple into particular estates and remainders. It is not given to her for life or in tail, but the terms used are, "*Hamels* is to go to *Catherine Mellish*." That implies that it is to go as an inheritance at law; that the whole of the estate and not a part of it is to go. The very circumstance of the annuity being made chargeable on *Catherine Mellish* immediately, shews that that must have been the intention, for otherwise she might have sustained a loss by reason of the annuity. *Com. Dig. tit. Devise, (N.) 4. Lee v. Withers (a), Andrew v. Southhouse (b)* are authorities upon this point. Besides, it appears from other parts of the will, that when the testator used the words 'to go,' he meant the entire interest. For in the early part of his will he directs that *Catherine Mellish* shall have the disposal of the 25,000*l.*; and in case she does not dispose of it, it is to go to other persons in certain proportions therein mentioned; and it appears also, from the preceding part of the will, when he used the word "*Hamels*," he meant the estate of inheritance which he had in *Hamels*; for in estimating the value of all his property, he placed against the word "*Hamels*" the figures 43,000*l.* It is clear, therefore, that in the subsequent part of the will,

(a) *Sir T. Jones*, 107,(b) 5 *T. R.* 292.

when

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when he used the same term *Hamels*, he meant that entire interest in *Hamels* which he estimated to be of the value of 43,000*l.*; viz. the estate of inheritance. The testator appears, in the early part of his will, to have estimated the value of his whole property at 120,000*l.*; and he bequeaths in specific legacies nearly the whole of the 40,000*l.*, which was the sum that remained, after deducting the estimated value of *Hamels*, and the amount of the money settled upon his marriage, from the entire value of his property. It is clear, that if he had in terms devised the estate in *Hamels*, or all his interest in *Hamels*, that would have carried the fee; and if it can be shewn, therefore, that by the word *Hamels* he meant his whole interest in it, then the whole of that interest will pass as well as if he had used the term. Now, although where the will leaves it in doubt, whether the devise is to operate as a contingent remainder or an executory devise, the court will construe it to be a contingent remainder; yet here, the question is not whether contingent remainders shall be construed as executory devises, but whether the Court will give *Catherine Mellish*, by implication, particular estates, for the purpose of supporting these contingent remainders, the effect of which would enable her to defeat the testator's general intention. Now there is no case which goes to that extent. In *Walter v. Drew* (a), if the devise to *Richard* had been construed an executory devise, it would have been after general failure of *William's* issue, and would have been too remote; and therefore an estate tail was given to the eldest son by implication. The same observation applies to *Wealthy v. Bosville*. (b) The fee, therefore, either goes to *Catherine Mellish* by descent,

(a) *Com. Rep.* 372.(b) *Rep. temp. Hardw.* 258.

or

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or she takes it by purchase; and it is immaterial whether she take it by one medium or the other. The first event by which the fee given to *Catherine Mellish* is to be defeated, is in case she marry and has a son. Now the estate is not given expressly to *Catherine Mellish* for life, which would have been done if it had been intended that she should take that estate only; and there is a material distinction between the devise to the son and to the daughter. The latter is to take only at the death of her mother or her father, which shall first happen; but the former is to take immediately; for it is not necessary that he should be living at the time of her death. It is evident that the testator thought that he had given his daughter a sufficient provision for any one female; for in case *Catherine Mellish* should leave only one daughter, he gives the estate, not to that one daughter, but to *William Mellish*. Now it was quite as unreasonable to prefer his brother to his one granddaughter as to prefer his grandson to his daughter. Suppose *Catherine Mellish* married early, and had a son, and then lived to the age of eighty, why should the grandson wait till he attained the age of fifty or sixty before he takes and not take immediately, whilst his mother has such ample provision. [*Bayley J.* Suppose *Catherine Mellish* had had a son who lived only two days, and then died, and then that she had another son born, would that son take? If he did he must take as a purchaser, for he could not derive title from the first son.] That is a very nice supposition, and not likely to have occurred to the testator. The testator was contemplating the founding of a family, and he was desirous to have a male relation to succeed him, and he prefers a son before his granddaughter or his daughter. [*Bayley J.* Your argument would have this effect:

if

if *Catherine Mellish* had ten daughters, and each of them left children, but died before the mother, their issue would not take.] If she has more than one daughter, at her own or her husband's death, it is to go to the eldest daughter; but if none, it is to go to the testator's brother. The testator has so framed the devise that the children would take the personal property, but the real estate goes to the person whom he wished to represent his family. [Bayley J. Suppose the eldest daughter of *Catherine Mellish* to have children, and a second, third, and fourth daughter, and that the eldest daughter, in the lifetime of the mother, dies, leaving children, and that the second daughter, in the lifetime of the husband, dies, leaving children, and that at the death of *Catherine Mellish* she has still two daughters living, who would take the estate?] The only question is, which construction most nearly satisfies the intention of the testator. As to *son* being nomen collectivum, the case of *Wight v. Lee* is distinguishable, because there, the words "in default of issue" were introduced. The same observation applies to *Wharton v. Gresham*. (a) As to the case of *Charlton v. Craven*, there were the words "severally and successively," which distinguish it from this case. In *Lovelace v. Lovelace* (b), it was held that a devise to one, and his eldest issue male, passed an estate for life only, but that a devise to one and his issue generally passed an estate tail. (c) [Bayley J. In *Perrot's* case (d) it is said that the lands mentioned in *Lovelace v. Lovelace* were gavelkind.]

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(a) 2 Bl. 1083.

(b) Cro. Eliz. 40.

(c) Robinson on Gavelkind, 37.

(d) Moore, 368.

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Preston in reply. The heir at law cannot be disinherited, unless there be words in the particular instrument to pass the estate from him. Nothing can be inferred from the direction that the mortgage was to be paid off. *William Mellish* was liable, and directed to pay it in his character of residuary legatee; and the annuity is not charged on the real estate, and therefore would be payable out of the personalty. It is clear, as a rule of law, that the gift cannot be construed as an executory devise if it can operate in any other mode. Now it is said, that the gift is to *Catherine Mellish* in fee, defeasible in three events; but if that be the effect of the will, what becomes of the husband. If the fee be determined by the executory devise, the courtesy will fail with it, and that is inconsistent with the will; because the will supposes that the husband of *Catherine Mellish* is to have some interest, in the event, at least, of there not being any son; for the estate is to go to the eldest daughter either on the death of the husband or of the mother. It has been argued, that on the death of *Catherine Mellish*, if she should have a son, a son would take immediately. A daughter could take only if there was not any son, and if there were several daughters, the eldest daughter could take only a life-interest for want of words of inheritance. If *Catherine Mellish* had one son by her first husband, the son, if he took the fee immediately on his birth, would become the first purchaser and an ancestor; and if he died without issue, and there should be a second son of the half blood, that son could not take because the fee had vested by purchase in the first son; so that if the first son died without issue, leaving a sister of the whole blood, and a brother of the half blood, it is clear that
the

the second son of *Catherine Mellish* would be excluded. Suppose again, *Catherine Mellish* to die leaving grandsons, they would not take unless she herself took an estate in tail male. Now, could it have been the intention of the testator to prefer his brother, if there were any male heirs descended from his daughter. It is absurd to suppose that the descendants of Miss *Mellish* are to be excluded, merely because there might not be any son living at her death. This is incompatible with the intention of the testator, and the scope of his will; were several daughters to exist, and all the daughters to die during Miss *Mellish*'s life-time, but to have left issue, could it be reasonably concluded that that issue of the eldest daughter could not take any benefit? The testator's intention clearly was, to prefer all the descendants of his eldest granddaughter to *William Mellish*. He otherwise would not have introduced words shewing a preference of the eldest female as an heiress before his brother. *Bifield's* case was the earliest decision on which the word "son" was construed as a collective term.

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BAYLEY J. It may be collected from the authorities, that if the word *son* be used not as a designatio personæ, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest intention of the testator to give an estate tail; and it is equally clear, that words are not to operate by way of executory devise, which are capable of operating in any other way. In this case the words are, "*Hamels* to go to my daughter *Catherine Mellish* as follows, viz. in case she marry and has a son, then it is to go to that son." Now, if the

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word *son* be used as a nomen collectivum, it would give to *Catherine Mellish* an estate to continue so long as there should be any male descendants of *Catherine Mellish*, and that would be an estate in tail male. I cannot find in the subsequent part of this will, any thing inconsistent with the construction that ought to be put upon it if it had stopped here. We shall not, however, give our decision at present.

HOLROYD J. It appears to me that the word *son* in this will, should be read *any son*. In the first place, the estate is to go to the daughter in a particular mode; for it is to go to his daughter "as follows," and he then describes the mode in which it is to go, that is, that a son should have it if *Catherine Mellish* marry and have a son; and he is then describing in what way the daughter shall have it, and supposing her son be to have the estate, he could only take it in that case by descent, unless the will operated as a gift to the daughter, and not only to the daughter, but subsequently as a gift to that son and another son, so as to be doing away with the life estate of the daughter. The words are, "in case she marry and has a son, to go to that son; in case she has more than one daughter at her or her husband's death, to go to the eldest daughter. Now, if the word *son* be construed to mean not an immediate descendant, but any son, whether immediate or remote, such as a grandson, then all difficulty seems to be removed; for, according to that construction, the limitation over to the eldest daughter would not take effect, even although the immediate son were dead, if there were a grandson living, or a great grandson, so that the male descendants of his daughter would not be excluded; but if the word

son

son be confined to the immediate son, the consequence would be, that if that son died leaving sons, the estate would go over to the daughters.

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The following certificate was afterwards sent.

This case has been argued before us, and we are of opinion, that *Catherine Mellish* took an estate in tail male with a reversion in fee, subject to other estates created by this will.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1824.

IN THE

Court of KING's BENCH

IN

Hilary Term,

In the Fourth and Fifth Years of the Reign of
GEORGE IV.

MEMORANDA.

IN the course of the vacation Sir *Robert Dallas*, Knight, resigned the office of Chief Justice of the Common Pleas, and was succeeded by Sir *Robert Gifford*, Knight, his Majesty's Attorney-General, who was called to the degree of Serjeant at Law. The motto on his rings was "Secundis Laboribus." He took his seat on the bench on the first day of this term, and was soon afterwards raised to the dignity of a peer of the realm, by the title of Baron *Gifford*, of *St. Leonards*, in the county of *Devon*.

In the course of last term Sir *Richard Richards*, Knight, the Lord Chief Baron of the Court of Exchequer,

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quer, died at his house in *Ormond-street*. He was succeeded by *William Alexander*, Esquire, one of the Masters in Chancery, who was called to the degree of Serjeant at Law, and gave rings, with the motto "*Secundis Laboribus*," and took his seat upon the bench on the first day of this term.

Sir *John Singleton Copley*, his Majesty's Solicitor-General, was appointed to the office of Attorney-General.

Charles Wetherell, of the *Inner Temple*, Esquire, was appointed to that of Solicitor-General.

In the course of this term, Sir *John Simeon*, one of the Masters in Chancery, died, and *William Wingfield*, Esquire, one of his Majesty's counsel learned in the law, and *James Farrer*, of *Lincoln's Inn*, Esquire, were appointed to the vacant offices of Masters in Chancery.

Friday,
January 23d.

KING *against* WILLIAMS.

Where, in debt on simple contract, the defendant waged his law, the Court refused to assign the number of compurgators with whom he should come to perfect his law.

DEBT on simple contract. Defendant pleaded nil debet per legem; and the Master having appointed a day for the defendant to come into court with his compurgators,

Langslow applied to the Court to assign the number of compurgators, with whom the defendant should come to perfect his law. The books leave it doubtful whether six or eleven are necessary. In *les termes de la ley*, p. 442. (which book is ascribed to *Rastall*, by the preface to *10 Co.*, and is there mentioned as a work of high estimation) is this passage: "*Mes quant un gagera son ley, il amesnera ovesque lui 6, 8, or 12 de ses vicines* come

come le court lui assignera de jurer ovesque lui." [*Bayley* J. Is it not said in *Blackstone's Com.* that eleven are necessary? (a)] It is, but his opinion is founded on *Co. Lit.* 295. and 2 *Inst.* 45., and the authorities there cited, viz. *Fleta*, b. 2. c. 63., and 33 *H.* 6. 8. do not support the position. In *Fleta* it is stated, that the number of compurgators shall depend upon the number of the secta, produced by the plaintiff; that is to say, if the secta consist of two, the compurgators shall be four, and so on, the compurgators being double the number of the secta, until the secta shall amount to six, when it will not be necessary for the compurgators to be double their number; but eleven will be sufficient; and the assertion in the *Year-book* before mentioned, that the tenant shall make his law de duodecima manu, that is to say, eleven and himself, is merely by counsel in argument. In an anonymous case, in 2 *Ventr.* (b) it is stated that less than eleven compurgators will do. In *Style's Practical Register*, p. 572., it is said of wager of law, "He that is to do it, must do it duodena manu, viz. he must bring six compurgators with him, the defendant then sweats de fidelitate, the compurgators de credulitate." This species of defence is not often heard of now; but in *Barry v. Robinson* (c) the court denied that a wager of law would now be disallowed.

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ABBOTT C. J. The Court will not give the defendant any assistance in this matter. He must bring such number of compurgators as he shall be advised are sufficient. If the plaintiff is not satisfied with the number brought,

(a) Vol. iii. 343.

(b) 171.

(c) 1 N. R. 297.

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the objection will be open to him, and then the Court will hear both sides.

Rule refused.

The defendant prepared to bring eleven compurgators, but the plaintiff abandoned the action.

Wednesday,
January 28th.

HAWES and Another against WATSON and Another.

A., by contract, sold to *B.* a quantity of tallow, then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and re-house the same. *B.* having entered into a contract to sell tallow to *C.*, obtained from the wharfingers and gave to *C.* a written acknowledgment that they had transferred the tallow to the account of *C.*, and that *C.* was to be liable to charges from a given date. *B.* having stopped payment, *A.* gave notice to the wharfingers not to deliver the tallow

TROVER for a quantity of tallow. Plea, not guilty.

At the trial before *Abbott C. J.*, at the *London* sittings after *Michaelmas* term, the following facts were proved for the plaintiffs. The plaintiffs, on the 25th *September*, 1823, purchased by contract, of Messrs. *Moberly* and *Bell*, 300 casks of tallow, at 40s. per cwt. On the 27th *September*, in part execution of their contract, *Moberly* and *Bell* sent to the plaintiffs the following transfer note, signed by the defendants, who were wharfingers. "Messrs. *J. and B. Hawes*, we have this day transferred to your account, (by virtue of an order from Messrs. *Moberly* and *Bell*) 100 casks tallow, ex *Matilda*, with charges from *October* 10th, 1823. *H. and M.* 100 casks." The plaintiffs then gave *Moberly* and *Bell* their acceptance for 2880*l.*, the price of the tallow, which was duly paid, and afterwards sold 21 casks of this tallow, which the defendants delivered, pursuant to their order. *Moberly* and *Bell* stopped payment on the 11th *October*, and on the 14th the defend-

ants

ants received notice from *Raikes* and Co., the original vendors of the tallow, not to deliver the remaining casks to *Moberly* and *Bell*, or their order; and the defendants, in consequence, refused to deliver the remainder of the tallow to the plaintiffs, upon their demanding the same. On the part of the defendants it was proved, that *Moberly* and *Bell*, on the 26th *September*, had purchased of *Raikes* and Co. 100 casks of tallow (the same that were afterwards sold to the plaintiffs) landed out of the *Matilda*, lying at *Watson's* wharf, at 2*l.* 1*s.* per cwt., to be paid for in money, allowing 2½ per cent. discount, and fourteen days for delivery; and on the same day *Raikes* and Co. gave a written order upon the defendants to weigh, deliver, transfer, or rehouse the tallow. *Moberly* and *Bell* had not paid for the same, nor had it been weighed subsequently to this order. Upon these facts it was contended at the trial, on the part of the defendants, that they were not bound to deliver to the plaintiffs the remaining 79 casks of tallow, inasmuch as *Raikes* and Co. had, as between them and *Moberly* and *Bell* a right to stop them in transitu, the delivery to *Moberly* and *Bell* not being perfect, inasmuch as the tallow had not been weighed. The Lord Chief Justice, however, was of opinion, that whatever the question might be as between buyer and seller, the defendants having, by their note of the 27th *September*, acknowledged that they held the tallow on account of the plaintiffs, could not now dispute their title; and the plaintiffs had a verdict.

The *Attorney-General* now moved for a new trial, upon the ground taken at the trial. *Hanson v. Meyer* (a)

(a) 6 *East*, 614.

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is an authority to shew, that the absolute property in the tallow would not vest in *Moberly* and *Bell*, the first vendee, until it was weighed. The contract in that case was in terms similar to the contract made between the original vendors and *Moberly* and *Bell*. The weighing must precede the delivery, in order that the price may be ascertained. In that case, too, part of the goods had been weighed and delivered, yet it was held, that the vendor might retain the remainder, which continued unweighed in his possession; and *Shepley v. Davis* (a) is also an authority to the same effect.

ABBOTT C. J. The plaintiffs, in this case, paid their money upon the faith of the transfer note, signed by the defendants, by which they acknowledged that they held the tallow as their agents. If we were now to hold, that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable the defendants to cause an innocent man to lose his money. To hold that the doctrine of stoppage in transitu applied to such a case as the present, would have the effect of putting an end to a very large portion of the commerce of the city of *London*.

BAYLEY J. This appears to me very different from the ordinary case of vendor and vendee. In such cases, justice requires that the vendee shall not have the goods unless he pays the price. If he cannot pay the price, the vendor ought to have his goods back; but if the question arises, not between the original vendor and the original vendee, but between the original vendor and a purchaser from the vendee, that purchaser having paid

(a) 5 *Taunt.* 617.

the full price for the goods, what is the honesty and justice and equity of the case? Surely, that the vendee, who has paid the price, shall be entitled to the possession of the goods. I am of opinion, that when Messrs. *Raikes* and Co. signed the order to transfer, weigh, and deliver, that, according to the settled course and usage of trade, enabled *Moberly* and *Bell* to sell the goods again. There are many cases in which it has been held, that if the first vendor does any thing which can be considered as sanctioning the sale by his vendee, that destroys all right of the former to stop in transitu. *Stoveld v. Hughes*, (a) *Harman v. Anderson*. (b)

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HOLROYD J. I think that the note given by the defendants makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs, and the latter were to be liable from the 10th *October* for all charges. This case is very different from that of *Hanson v. Meyer*. There, there was a sale of all the vendor's starch, (the quantity not being ascertained,) at 6*l.* per cwt. The order was to weigh and deliver all the vendor's starch, and a part having been weighed and delivered, but not the residue, the main question before the Court was, whether the weighing and delivery of part did or did not in point of law operate as a transfer of the property as to the whole. The Court held, rightly, that it did not, because there the price of the whole which was to be paid for by bills could not be ascertained before it was weighed. The delivery of part, therefore, was not a delivery of the whole,

(a) 14 *East*, 308.(b) 2 *Campb.* 243.

but

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but the order was complied with only as to the part which was weighed and delivered, and the property in the residue remained unchanged until something further was done. It was not a delivery of part for the whole, and therefore it did not operate in law as a delivery of the whole so as to divest the vendor of his right to stop in transitu; but here, the wharfingers upon the receipt of the order directing them to weigh and deliver, sent an acknowledgment that they, the wharfingers, had transferred the goods to the vendees, and that they would be considered as subject to charges from a certain period. I think, therefore, that the wharfinger then held the tallow as the goods of the plaintiffs and as their agents, although there was not any actual weighing of them; and that the plaintiffs were then in possession by the defendants as their agents, they having acknowledged themselves as such by their note. For these reasons I am of opinion that the plaintiffs are entitled to recover.

BEST J. I am also of opinion, that the acknowledgment which has been given in evidence puts an end to all question in this case. The very point has already been decided in the case of *Harman v. Anderson*. (a) There the wharfinger had transferred the goods to the name of the vendee, and actually debited him with warehouse rent, but he having become insolvent, the sellers gave notice to the wharfingers to retain the goods; and upon an action of trover being brought against the wharfingers by the assignees of the vendee, it was contended that the sellers' right to stop in transitu con-

(a) 2 *Campb.* 243.

tinued,

tinued; but Lord *Ellenborough* said, "that the goods having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage in transitu. From that moment the defendants became trustees for the purchaser, and there was an executed delivery, as much as if the goods had been delivered into his own hands. The payment of rent in these cases is a circumstance to shew on whose account the goods are held; but it is immaterial here; the transfer in the books being of itself decisive." In the ensuing term, the then Attorney-General (afterwards Lord C. J. *Gibbs*) expressed his acquiescence in the decision at *Nisi Prius*. In that case, indeed, it does not appear that, in order to ascertain the price, it was necessary to weigh the goods, but in a subsequent case of *Stonard v. Dunkin (a)*, it was expressly held by Lord *Ellenborough*, that a warehouseman, who, on receiving an order from the seller of malt, to hold it on account of the purchaser, gave a written acknowledgment that he so held it, could not set up as a defence for not delivering it to the purchaser, that by the usage of trade, the property in malt sold was not transferred till it was *re-measured*, and that before the malt in question was remeasured, the seller became bankrupt; and there Lord *Ellenborough* says, "whatever the rule may be between the buyer and seller, it is clear the defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing, they attorned to him." It appears to me too, that if we consider the principle upon which the right of stoppage in transitu is founded, it cannot extend to

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(a) 2 *Comp.* 344.

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such a case as the present. The vendee has the legal right to the goods the moment the contract is executed, but there still exists in the vendor an equitable right to stop them in transitu, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons. Now it appears to me impossible, that it can be exercised in this case without disturbing the rights of third persons, for the property has not only been transferred to the purchaser in the books of the wharfingers, but there has been an acknowledgment by them, that they hold it for the purchaser, who has paid the price of it. It has been said that there has been no change of property. If there has not, I do not see how there can be any until the tallow is actually melted down and converted into candles. If the argument on the part of the defendants be valid, the vendor, if he is not fully paid, has a right if the goods are not weighed, to stop in transitu, even though they have passed through the hands of a hundred different purchasers and been paid for by all except the first. It appears to me, that we should disturb an established principle if we held that this could be done in such a case as the present. I think the right of stoppage in transitu is an equitable right to be exercised by the vendor, only when it can be done without disturbing the rights of third persons. (a) Here, that cannot be done, and therefore I think that *Raikes and Co.* had not any right to stop in transitu, and that the plaintiffs are therefore entitled to recover.

Rule discharged.

(a) See *Cumming v. Brown*, 9 East, 506.

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JEE, Clerk, *against* THURLOW.

DEBT on an indenture, made between defendant of the first part, his wife of the second part, and plaintiff, a trustee for the wife, of the third part, whereby, (after reciting that certain differences had then lately arisen and taken place between defendant and his wife, and that they had mutually agreed to live separate and apart,) defendant covenanted to pay his wife, during so much of her natural life as he should live, an annuity of 80*l.* a year. Breach, non-payment of one quarter's annuity. Plea first, cravedoyer of the deed, whereby it appeared that defendant covenanted not to sue his wife for restitution of conjugal rights, and that she agreed to accept the said annuity for her support, to leave their children under the sole control of defendant, without any interference by her, and that if defendant paid any debts for her, he should be at liberty to deduct the amount out of the annuity. And plaintiff, on behalf of the wife, covenanted that she should release and give up all claim of jointure, dower, or thirds, and that he would indemnify defendant against all her debts. The plea then averred, that after the making of the indenture, the wife instituted, in the Consistory Court of the Lord Bishop of *London*, a cause against defendant for the restitution of conjugal rights; in which cause defendant caused to be given in, and admitted an allegation and exhibits, charging his wife with certain acts of adultery; and that

By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds: Held, that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *à mensa et toro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity.

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such proceedings were thereupon had in the Consistory Court in the said cause, that by a decree of that court, made in the said cause, defendant and his wife were divorced from bed and board; and concluded with a verification. Demurrer and joinder.

Chitty, in support of the demurrer. The plea in this case is certainly bad. In the first place, the covenant is absolute to pay during the life of the defendant, and is not qualified to pay, only so long as the parties should live separate, or as long as the wife should continue chaste. It will perhaps be urged that this is analogous to a demand of dower, which is forfeited by adultery, and that this action is barred by the decree of the Ecclesiastical Court. But dower is, under such circumstances, forfeited by the express words of an act of parliament. (a) Nor can the decree alluded to be well pleaded as a bar in this court. In *Sidney v. Sidney* (b), it was held that adultery was no bar to a claim of the specific performance of marriage articles; and in *Field v. Serres* (c), the court of C. P. refused to allow the defendant, in such an action as the present, to withdraw the general issue and plead the adultery of the wife, because it would not be an answer to the action. The principal question is, whether such deeds as the present can be in any event supported. With the exception of *Titley v. Durand* (d), there is no case upon which an argument against them can be founded; and although the present Lord Chancellor, in *St. John v. St. John* (e), has said that, if it were *res integra*, the question would

(a) *Westm.* 2. c. 34.(b) 3 *P. W.* 269.(c) 1 *N. Rep.* 121.(d) 7 *Price*, 577.(e) 11 *Ves.* 526.

be worthy of great consideration, yet he has upheld the former decisions. Such were *Lord Rodney v. Chambers* (a) and *Guth v. Guth*. (b) In *Worrall v. Jacob* (c), Sir *W. Grant*, then Master of the Rolls, treated it as settled law, that such deeds were valid; and in *Stuart v. Kirkwall* (d) effect was given to such an arrangement; for it was there held that a married woman, separated from her husband, and having a separate maintenance, might render that liable by accepting a bill of exchange. The reasons for the judgment in *Titley v. Durand* do not appear; but that case is essentially different from the present, inasmuch as the deed provided for the future separation of the husband and wife, at the mere discretion of the latter, without requiring the consent or approbation of trustees, as in *Lord Rodney v. Chambers*.

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Patteson, contra. The plea is a sufficient answer to the action. By the deed, as set out on oyer, it appears that the defendant covenanted not to sue his wife for restitution of conjugal rights. It is true, that the wife did not expressly enter into any such covenant; but her covenant to leave the children under his sole management is in effect the same, for she cannot sue for restitution of conjugal rights without breaking that covenant. She, therefore, by proceeding in the Ecclesiastical Court, took the first step towards destroying the deed. This must be considered as an action by the wife; any matter of defence against the cestui que trust is also a defence against the trustee. Had the wife succeeded in that

(a) 2 *East*, 283.(b) 3 *Br. C. C.* 614.(c) 3 *Mer.* 256.(d) 3 *Madd.* 387.

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suit, the deed would have been vacated ; and she would have succeeded but for the allegation of adultery there set up as a defence. Now it would be somewhat singular if the situation of the wife were to be better in this court, on account of a charge of adultery having been proved against her in another. That a deed of separation is at an end if the parties come together again, is proved by *Bateman v. Ross* (a), *St. John v. St. John* (b), and *Fletcher v. Fletcher*. (c) *Gawden v. Draper* (d), which at first sight appears to warrant a different opinion, turned entirely upon the pleadings. [Bayley J. Nothing appears on the record which can warrant this Court in saying that adultery has been committed. The ecclesiastical courts proceed upon evidence of which we cannot take notice.] It has certainly been held, that adultery would not be a good plea to such an action as the present, but this plea goes further, and shews a judgment on the point by a court of competent jurisdiction. But, whether the plea be good or bad, the action cannot be maintained, for the deed itself is illegal and void. Several cases have been cited, in which the validity of deeds of separation was recognised ; but many high authorities have expressed great doubts upon the subject.

feel themselves at liberty to decide in favour of this defendant, notwithstanding the cases in the books, if they shall be satisfied of the impolicy and impropriety of such contracts.

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ABBOTT C. J. The Judges who decided the case of *Titley v. Durand* did not intend to shake any former decision. They thought it different from all the former cases, inasmuch as the deed provided for future separations of the husband and wife, who, at the time of making the deed, were living together. For a long series of years, all the judges, when called upon to pronounce judgment in such cases, have felt themselves bound by former decisions, although each of them in his turn has said, that his opinion would probably have been different, had the question been *res integra*. In *St. John v. St. John*, the Lord Chancellor says, "If this were *res integra* untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if dicta have followed dicta, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject." That opinion is a fit guide for us. Ought not we to say, that if a new decision is to overturn all the former cases on this question, it must be the decision of that high tribunal which is competent to give the law to all other tribunals, and rectify their errors, whenever called upon to review them. For these reasons, I cannot, sitting in this place, say that the deed is void. The only question then is upon the sufficiency of the plea. It has been

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decided,

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decided, that a plea stating the commission of adultery by the wife is not sufficient, upon this ground, that if the husband, when executing such a deed as this, thinks proper to enter into an unqualified covenant, he must be bound by it. Had he wished to make the non-commission of adultery a condition of paying the annuity to his wife, he should have covenanted to pay it *quamdiu casta vixerit*. A plea of a judgment in the Ecclesiastical court, but not alleging the fact of adultery, is not at all more favourable for the defendant; our judgment must, therefore, be for the plaintiff.

BAYLEY J. There is a very plain distinction between this case and *Titley v. Durand*. There the contract provided for future separation at the will of the wife; it was offering a premium to her for leaving her husband. In *Lord Rodney v. Chambers*, that objection did not apply, for the intervention of impartial persons was there required, to decide whether sufficient cause of separation did or did not exist. As to the general question, I am of opinion, that as it has for so long a period of time been the system of jurisprudence to hold such deeds valid, it is not for this Court to entertain the

plea is insufficient, and the plaintiff is entitled to our judgment.

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HOLROYD J. This is a covenant made to provide for a separation which had been determined upon before the execution of the deed, and is for the payment of an annuity during the wife's life, if the husband should so long live. It is founded upon what the law considers a good consideration; for there is a covenant by the trustee to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, or thirds. (a) It is conceded, that adultery would not be a forfeiture of an annuity so granted. That a jointure would not be thereby forfeited is shewn by *Sidney v. Sidney*, (c) which was confirmed by *Seagrave v. Seagrave* (b), where the question arose on a bond containing provisions very similar to those in the deed in question. But it has been argued, that the wife, by suing for restitution of conjugal rights, has done an act inconsistent with the deed, and that the covenant is thereby destroyed, as much as if they had come together again. It is to be observed, that the covenant is not limited to the period of separation. But if it is to receive that construction, that is only upon the ground that the wife, when reunited to her husband, would be maintained by him, and therefore it does not follow that the deed is avoided by an unavailing attempt to obtain restitution. The case then resolves itself into the general question, whether a covenant is

(a) See *Compton v. Collinson*, 2 Br. C. C. 377. *Stevens v. Olive*, [ib. 90.; and *Rex v. Brewer*, ib. 93. n.

(b) 13 Ves. 439.

(c) 3 P. Wms. 269.

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binding which provides for a separation between husband and wife, already determined upon, and not for a future separation at the mere will of either of them. The language of the Lord Chancellor in *St. John v. St. John* is binding upon us. We cannot do otherwise than abide by those decisions which have from time to time been made both in courts of law and equity; particularly where the covenant to pay the annuity is founded upon engagements on the part of the trustees which are in ease of the husband; which distinction, in favour of such deeds as the present, is noticed by the Master of the Rolls in *Worrall v. Jacob*.

BEST J. It seems that the plea in this case is not offered as an answer to the action, so much on the ground of the deed being vacated by adultery in the wife, as on the idea of her having put an end to the articles, providing for her separate maintenance, by suing for restitution of conjugal rights. I can well understand what was said in *Bateman v. Ross*, because there the wife would have had a maintenance by living again with her husband. But here the husband opposed the attempt made by the wife, who, in consequence of that opposition, is still in need of the maintenance which it was the object of the deed to provide. As to the other point I entertain no doubt. Whatever opinions judges may have entertained as to the policy or impolicy of such contracts as this, it would be a strong measure for us, on the mere ground of policy, to overthrow former decisions, when Lord *Eldon*, sitting in the House of Lords, did not feel himself strong enough to do so. In the case of *Bateman v. Ross*, he must have advised the Lords
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to decree in favour of the articles, for it appears that they were established, sufficient proof of the fact of reconciliation not having been given.

Judgment for the plaintiff.

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JEE
against
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HULKE against PICKERING.

Monday,
January 26th.

A RULE nisi was obtained to enter up judgment on a warrant of attorney more than twenty years old. The affidavit did not state any circumstances tending to prove that the money remained unpaid.

Judgment cannot be entered up on a warrant of attorney more than twenty years old, without an affidavit stating facts which rebut the presumption of payment.

F. Pollock shewed cause, and contended, that, after the lapse of twenty years, the presumption of payment applied to warrants of attorney as well as other securities, and that some facts should have been stated to rebut that presumption.

Abraham, contra. None of the books of practice contain any form of affidavit to be used on such occasions, setting out circumstances to negative the presumption of satisfaction. If any answer to the claim can be given, that should come from the other side.

Per Curiam. We think that in this as in other cases, the plaintiff should, after the lapse of so long a period, state some facts to shew that the warrant of attorney has not been satisfied.

The plaintiff accordingly produced such an affidavit, and the rule was made

Absolute.

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Wednesday,
January 28th.

BISHOP and Another *against* MACINTOSH and
Another.

The 43 G. 3.
c. 56. s. 2.
prohibits
the conveying
in any ship,
from any place
in the United
Kingdom, a
greater number
of persons than
in the propor-
tion of one per-
son for every
two tons of the
burden of the
ship, and every
such ship is to
be deemed to
be of the bur-
den described
in the certifi-
cate of registry;
and if any ship
is partly laden
with goods the
master is pro-
hibited from
taking on board
a greater num-
ber of persons
than in the pro-
portion of one
person for every
two tons of that
part of the ship
remaining un-
laden: held
under this act,
that vessels
partly laden
with goods
were to be
deemed of the
burden des-
cribed in the
certificate of
registry.

ASSUMPSIT, in consideration that plaintiffs had sold and delivered to defendants ship's stores, and had also effected a policy of insurance on the ship *Hope*, on a voyage from *England* to *New South Wales*, for 392*l.*, to be received by plaintiffs in *New South Wales*, at the termination of the voyage; the defendants undertook that they, unless prevented therefrom by inevitable accident, would cause the voyage to be performed, and the money to be paid to the plaintiffs at *New South Wales* within a reasonable time. Breach, that the defendants did not, although not prevented therefrom by inevitable accident, cause the voyage to be performed, or the money to be paid within a reasonable time. Plea, general issue. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after *Michaelmas* term, it appeared, that the defendants were the owners of the ship *Hope*, which, in the certificate of registry, was stated to be of the burden of 230 tons, and that she sailed from *London* on her voyage to *New South Wales* with a cargo, and having ninety passengers on board and a crew of seventeen men, including the master, and that she was detained at *Ramsgate* by the officers of the customs, on the ground that she had a greater number of passengers on board than was allowed by law. The defendants contended that she had no more than that number, that the seizure was unlawful, and that they were therefore prevented by inevitable accident from performing the voyage.

voyage. The question turned on the stat. 43 G. 3. c. 56. s. 2., by which it was enacted, that it should not be lawful to convey from any place in the United Kingdom to any parts beyond sea in any ship, a greater number of persons, whether adults or children, including the crew, than in the proportion of one person for every two tons of the burthen of such ship or vessel; and every such ship or vessel should be deemed and taken to be of such tonnage or burthen as is described, and set forth in the respective certificate of the registry of each and every such ship; and if any such ship or vessel should be partly laden with goods, wares, or merchandise, then it should not be lawful for the master to receive or take on board a greater number of persons including the crew, than in the proportion of one person for every two tons of that part of such ship or vessel remaining unladen; and such goods, wares, and merchandise should, at the sight and under the direction of the collector or comptroller, or other officer of the customs, at the port or place where such goods, wares, or merchandise should be taken on board, be stowed and disposed of in such manner as to leave good, sufficient, and wholesome accommodation for the proportion of persons thereby allowed in such case to be received on board." A verdict having been found for the plaintiffs, it being admitted, that if the vessel was to be taken as of the burden described in the register, there were more passengers than the law allowed, it now appeared by affidavit, that although the tonnage mentioned in the register was 230, yet that, in point of fact, the vessel measured 269, and that the cargo was stowed in the hold, and not between decks.

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BISHOP
against
MACINTOSH.

The

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against
MACINTOSH.

The *Attorney-General* now moved for a new trial, and contended, that although with respect to every vessel not carrying a cargo, the tonnage was to be taken to be that described in the certificate of registry, yet that, with respect to vessels partly laden with goods, the actual tonnage was to be considered; but

The Court were clearly of opinion, that the sound construction of the act was, that all vessels, whether partly laden or not, should be deemed to be of the burden mentioned in the certificate of registry.

Rule refused.

Thursday,
January 29th.

MOODY against KING and PORTER.

A. and *B.* having been in partnership dissolved it on the 14th *July*, the dissolution was advertised on the 17th, on the 16th a bill was drawn in the names of *A.* and *B.* which was accepted and paid by *C.* without consideration; *C.* afterwards sued *A.* and *B.* for money lent; *A.* pleaded bankruptcy and certificate, *B.* non assumpsit, nol. pros. as to *A.*: Held, that he was a competent witness for *B.* to prove that *C.* accepted the bill for his (*A.*'s) accommodation, and not for that of *B.*, for that *B.* was only a surety, and might have proved under *B.*'s commission.

ASSUMPSIT for money lent, &c. on the usual money counts. Plea, by *King* non-assumpsit, by *Porter* bankruptcy and certificate, nol. pros. as to him. At the trial before *Abbott C. J.*, at the *Westminster* sittings after last *Michaelmas* term, it appeared that the plaintiff had accepted an accommodation bill drawn in the names of the two defendants, which he afterwards paid. The defendants had been in partnership for some years, but separated on the 14th *July*, 1821. The bill in question was drawn on the 16th, and the dissolution of the partnership appeared in the *Gazette* on the 17th of the same month. *Porter* became bankrupt in *February* 1822. For the defendant *King*, it was proposed to examine *Porter*, to prove that the bill was accepted for

his

his accommodation alone, and not for that of *King*. It was objected that *Porter* was not a competent witness, because if the plaintiff recovered in this action, he (*Porter*) would be liable to *King*. The Lord Chief Justice overruled the objection, and the defendant obtained a verdict.

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MOODY
against
KING.

Scarlett now moved to enter a verdict for the plaintiff, and contended, that as this was a partnership transaction between *King* and *Porter*, the former could not prove under the commission against *Porter* until the bill was paid, and therefore his demand was not barred by the certificate. It is true, that where one person lends his name to a bill for another, he is within the meaning of the 49 G. 3. c. 121. s. 8. (a); but here, *King* was not a surety, for he and *Porter* were joint debtors, and his demand against *Porter* would not arise until the bill was paid.

ABBOTT C. J. The partnership which had before subsisted between *King* and *Porter*, was as between them dissolved on the 14th *July*, 1821, and the bill was not accepted till the 16th of the same month. It was not, therefore, as between them a partnership transaction, and *King* was only a surety for *Porter*. The debt might, therefore, have been proved, and *King's* claim was barred by the certificate.

Rule refused.

(a) See *Ex parte Young*, 2 *Rose*, 40.

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Thursday,
January 29th.

SKAIFE, Assignee of W. ALLAN, a Bankrupt,
against HOWARD.

In an action for goods sold and delivered, brought by the assignees of *A.*, against whom a commission of bankruptcy issued, on the petition of certain persons, who alleged that a debt was due to them as assignees of *B.*, a bankrupt: Held, that the petitioning creditor's debt was sufficiently proved by the production of the proceedings under the commission, (no notice of an intention to dispute it having been given) and that it was not incumbent on the plaintiffs to give any other evidence that the petitioning creditors were the assignees of *B.*

ASSUMPSIT for goods sold by the bankrupt to the defendant. Plea, non-assumpsit. At the trial before *Abbott C. J.*, at the *London* sittings after last term, the proceedings under the commission were produced to prove the petitioning creditor's debt, act of bankruptcy, and trading; and it appeared, that the commission issued on the petition of the assignees of one *Miller*, a bankrupt; and that there was a debt of 147*l.* due to them as assignees. It was contended at the trial, that some evidence should be given to shew that the parties who presented the petition, and to whom the debt was alleged to be due, were the assignees of *Miller*. The 49 G. 3. c. 121. enacted, that the commission and the proceedings under it are to be received as evidence of the petitioning creditor's debt, &c. Here the debt was due to the parties as assignees; the proceedings were not made evidence of the fact, that the parties stating themselves to be assignees of *Miller* actually were so. That ought to have been made out by proof of the assignment from the commissioners. The statute only dispenses with the necessity of proving by parol evidence the existence of a debt, &c. *Abbott v. Plumbe* (a), *Doe v. Liston*. (b) Before the statute, if the petitioning creditor were an executor, the probate must have been produced. Or if he was the assignee of

(a) *Doug.* 216.(b) 4 *Taunt.* 741.

another

another bankrupt, who was the creditor of the bankrupt in the particular case, there must have been proof of the trading and bankruptcy of both these persons, *Doe v. Liston*. (a) The Lord Chief Justice was of opinion, that the proceedings were sufficient evidence of a good petitioning creditor's debt due to the parties in the character which they appeared to have claimed; and a verdict was found for the plaintiff.

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SKAIFE
against
HOWARD.

Marryat now moved for a new trial upon the ground already stated.

ABBOTT C. J. This clause of the act of parliament is remedial, the object being to relieve the assignees of a bankrupt from the necessity of going through the proof of all the things necessary to support a commission of bankruptcy. The production of the proceedings is not a proof binding upon any party, because, by giving notice, he may call for other proof; but in the absence of any such notice they must be received as proof of all the matters contained in them. I agree that if the proceedings, when produced, do not contain facts sufficient to sustain the bankruptcy, they will not of themselves be sufficient; but I am not aware of any case where, if the facts stated on the deposition are sufficient of themselves to sustain the bankruptcy, any further proof has been required. It has been said that the statute only dispenses with parol evidence of the petitioning creditor's debt, but that is not so; for before the statute, a petitioning creditor would not have been a competent witness to support the commission in an action by the assignees of a bankrupt, but since the

(a) 4 Taunt. 741.

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against
HOWARD.

statute, where no notice is given, the petitioning creditor's debt has been held to be sufficiently proved by his own deposition before the commissioners (a), so that the statute has made depositions evidence in a case where parol evidence of the fact deposed to by the same person would not have been admissible. I think that we ought to give full effect to the provisions of this statute, and to hold, that the depositions are evidence of a debt due to the party in that character in which he appears to have claimed it. If it had appeared that the debt was due to the petitioning creditor, as executor, it would not have been necessary to produce the probate in order to prove that he was executor. I think, therefore, that the depositions must be taken for proof of the petitioning creditor's debt, &c., in all cases where the facts deposed to, if proved by other means, would support the commission.

A rule was afterwards granted upon another ground, disclosed by affidavit.

(a) *Bisse v. Randall*, 2 Camp. 493.

Saturday,
January 31st.

AARON *against* CHAUNDY.

In assumpsit on a promissory note, defendant pleaded non-assumpsit, and having made up the issue, ruled plaintiff to

enter it, who, by mistake, entered a plea of not guilty. Defendant signed judgment of non. proa. : Held, that the plea entered was substantially the same as the other, and the judgment was set aside.

ASSUMPSIT on a promissory note. Plea, non-assumpsit. Defendant made up the issue, and ruled the plaintiff to enter it. He entered it by mistake with a plea of not guilty, whereupon the defendant

signed

signed judgment of non. pros. *Adolphus* having obtained a rule to set aside the judgment,

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AARON
against
CHAUNDY.

Campbell shewed cause, and contended, that the judgment was regular. The plaintiff never entered the issue joined in this action, the defendant was therefore entitled to sign judgment. *Wood v. Miller.* (a)

Per Curiam. That case was very different; the objection there was, that the issue was entered as of a wrong term. The plea of not guilty in such a case as the present is substantially the same as non-assumpsit. The rule must, therefore, be absolute; but we think that it should be without costs.

Rule absolute, without costs.

(n) 3 East, 204.

COLLINS *against* GOODYER.

Saturday,
January 31st.

THE defendant was arrested and holden to bail on an affidavit made by the plaintiff, in which he described himself as of *Dorset Place, Clapham Road, Middlesex.*

The true place of abode of the deponent, as well as his addition, must be inserted in an affidavit to hold to bail.

Platt obtained a rule to shew cause why the bail bond should not be given up to be cancelled and a common appearance entered, on an affidavit that the plaintiff's residence was in fact *Dorset Place, Clapham Road, Surrey.*

Andrews

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COLLINS
against
GOODYER.

Andrews shewed cause, and contended that the defendant had not been misled, or in any way prejudiced by the mistake.

Per Curiam. A rule of this Court, *Mich. 15 Car. 2.* requires, that the true place of abode and true addition of every person who shall make affidavit here, shall be inserted in such affidavit. That is binding upon us, and we must make this rule absolute.

Rule absolute. (a)

(a) See *Jarrett v. Dillon*, 1 *East*, 18. *D'Argent v. Vivian*, *ib.* 350. *Vaissier v. Alderson*, 3 *M. & S.* 165. *Poller v. De Souza*, 4 *Taunt.* 154.

Thursday,
February 6th.

SOAMES and Another *against* LONERGAN and Another.

Where the charterers of a ship for a voyage from *C.* to *St. B.*, and thence to *G.* to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from *G.*, with a proviso, that in the event of the non-arrival of the first mentioned ship at

G., then the second charter should be void: Held, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not being attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her.

ASSUMPSIT on a charter-party of affreightment made between the plaintiffs, owners of the *St. Patrick*, and the defendants. The first count alleged, that the plaintiffs thereby agreed that the *St. Patrick* should sail from the port of *London* in ballast to *Cadiz*, remain there fifteen days, and then proceed to *Guyaquil*, and, if required, to such one other port on the west coast of *South America* as the said freighters or their agents might think proper and direct; and that in such case she should, in the first place, proceed to such other port, and subsequently to *Guyaquil*. And being arrived at

such

such destined port or ports, should receive and take on board from the agents of the freighters all such lawful goods or merchandise as they might think proper, up to a full cargo; and having received such cargo, should proceed therewith to some port in *Spain, England,* or the continent of *Europe*, as the said freighters or their agents might direct. That the said ship should, if required, lay at her destined port or ports for the purpose of receiving the said cargo on board, and at her destined port of discharge for unloading the same, 120 running days in the whole, to commence and be accounted from the day the said ship should arrive at her first destined port of loading, being admitted to pratique and ready to receive goods on board, to cease when dispatched therefrom, recommence on her arrival at her second port of loading, if ordered to more than one, being admitted to pratique and ready to receive goods on board there, cease again when despatched therefrom, and recommence on her arrival at her destined port of discharge, being also admitted to pratique and ready to deliver the said cargo. And the defendants agreed that they would, within fifteen days after the arrival of the said ship at *Cadiz*, dispatch her to *Guyaquil*, or previously to some one safe port on the west coast of *South America*, and should and would send alongside the said ship, at such port or ports, all such lawful goods as they might think proper to ship, and despatch her to some one port either in *Spain, England,* or the continent of *Europe*, and there receive such cargo from alongside the said ship within the 120 lay days thereinbefore limited for the purposes aforesaid, or within the days of demurrage thereafter mentioned; and would pay 6000*l.* in full for the freight. The declaration then averred

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 SOAMES
 against
 LONERGAN.

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Breach
against
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the arrival of the ship at *Cadiz*; that she was ordered to *Lima*, and arrived there on the 28th *March*, 1821; that the commander gave notice thereof, and offered to receive a cargo on board. Breach, that the defendants did not send alongside the vessel at *Lima* or *Guyaquil*, or any other port or ports on the west side of *South America*, or elsewhere, any goods, or supply any cargo, or despatch her to any port in *Spain*, *England*, or the continent of *Europe*. The second count set out the charter-party as before, and also a stipulation, that the vessel might be detained twenty days on demurrage, and the following proviso: "Provided always, and it was thereby understood and agreed by and between the said parties, that in the event of the non-arrival of the ship or vessel called the *Grant*, *Hogarth*, master, chartered and then on her voyage to *St. Blas de California*, at that port; then in such case that charter-party, and every clause and agreement therein contained should, in case no shipment should have been made under it, cease, determine, and be utterly void to all intents and purposes whatsoever." In addition to the averments in the first count this stated also that the *Grant* did arrive at *St. Blas* according to the tenor and effect

from *St. Blas*. Averment, that the *Grant* did arrive at *Guyaquil* from *St. Blas*, and then as the first count. The fourth count, after the same introduction as in the third, alleged a promise by defendants to use reasonable diligence on their part, so that the charter-party might not be avoided by the non-arrival of the *Grant* at *St. Blas*. Breach, that they did not use reasonable diligence, and that through their negligence and default the *Grant* did not arrive at *St. Blas*. Fifth count alleged the substitution of *Guyaquil* for *St. Blas*, and a promise to use diligence that the *Grant* might arrive there. Breach as in fourth count. Various common counts were added. Plea, the general issue. At the trial before *Abbott C. J.*, at the *London* sittings after last *Trinity* term, it appeared that a charter-party, in substance the same as that set out in the second count, was made by and between the plaintiffs and defendants; and that, afterwards, the proviso was extended to the non-arrival of the *Grant* at *Guyaquil* from *St. Blas* as alleged in the third count. The *Grant* was chartered by *Barron* and *M^r Pherson*, merchants at *Cadiz*, on whose account also the charter-party of the *St. Patrick* was entered into by the defendants. In pursuance of that charter-party, the *St. Patrick* sailed from *London* in *October*, 1820, and arrived at *Cadiz*, on the 15th of *November* following. Before the *St. Patrick* sailed from *Cadiz*, the captain, for himself and his owners, entered into another charter-party with *Don Juan A. de Arambura*, a merchant at *Cadiz*, to bring home a cargo from *South America*, subject to this proviso: "That in the event of the arrival of the *Grant*, then on her voyage to *Guyaquil* at that port, then that charter-party, and every clause and agreement therein

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contained, should, in case no shipment should have been made under it, cease, determine, and be utterly void, to all intents and purposes whatsoever." *Barron* and *M'Pherson* ordered the *St. Patrick* to proceed to *Lima*, for which place she sailed on the 10th of *December*, 1820, and arrived there *March* 28th, 1821, and on 30th, the captain gave notice of his arrival to the *Don Yzcue*, the correspondent of *Barron* and *M'Pherson*. The *St. Patrick* remained at *Lima* until *July* 21st, when the lay days, stipulated for in the charter, expired, and she was not after that time employed by the defendants or *B.* and *M.* under the charter-party. The *St. Patrick* was not dispatched to *Guyaquil* by *Don Yzcue*, or any person at *Lima* on behalf of the charterers, nor was any homeward cargo furnished for her. The ship *Grant*, in the proviso mentioned, arrived at *St. Blas*, *March* 5th, 1821, sailed thence for *Guyaquil*, *June* 5th, 1821, and arrived there *October* 19th, in the same year. On the 10th *November* following the captain made a protest, giving some account of the delay of his arrival, but not making any complaint that it had been caused by the freighters. The *St. Patrick* remained at *Lima* after the 21st of *July*, for the purpose of taking in a cargo, under the conditional charter. On the 24th of *July* she was taken possession of by the forces under *Lord Cochrane*, and liberated on the 23d of *August*, and afterwards took in some cargo and 130 passengers for *Cadiz*, and was despatched therewith on the 12th of *November*, and sailed on the 15th, and after touching at *Rio Janciro*, arrived at *Cadiz*, *April* 20th, 1822. The Lord Chief Justice told the jury, that in his opinion the arrival of the *Grant*, mentioned in the proviso, meant, an arrival in time for the object of the charter of the *St. Patrick*, and that un-
less

less they thought that the arrival of the *Grant* had been improperly prevented by the defendants, or by *Barron* and *M'Pherson*, they should find a verdict for the defendants. The jury having found a verdict for the defendants, the Attorney-General, in *Michaelmas* term, obtained a rule nisi for a new trial, on the grounds that the proviso in the charter of the *St. Patrick* was satisfied by the arrival of the *Grant* at *Guyaquil* at any time during her then voyage, and also, that it ought to have been presumed that she had been delayed improperly by the defendants, or *Barron* and *M'Pherson*.

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Scarlett and *F. Pollock* shewed cause. The return cargo of the *St. Patrick* was to be bought with the proceeds of the cargo carried out by the *Grant*. The arrival of the *Grant* at *Guyaquil* was the very condition on which this charter-party was made; that condition must necessarily have had reference to the arrival of the *Grant* within the scope of the voyage on which the *St. Patrick* was engaged, or it would be utterly useless and absurd. According to the construction contended for on the other side, the arrival of the *Grant* at any time would have been sufficient. If, indeed, the delay of the *Grant* could be attributed to the freighters of the *St. Patrick*, that might alter the case; but the jury have expressly found, that the freighters were not in fault. If the latter vessel, instead of remaining at *Lima*, had gone to *Guyaquil*, the captain would not have been bound to remain there more than 120 days; and, therefore, unless the *Grant* arrived there within that time, or such further time as the captain thought proper to wait, the charter of the *St. Patrick* was made void by the proviso; and therefore the circumstance of the *St. Patrick* not

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being despatched to *Guyaquil* by the agent of the freighters, cannot affect the present question.

The *Attorney-General* and *Campbell*, contra. Unless the Lord Chief Justice was right in deciding, as a question of law, that the condition of the *St. Patrick's* charter was not satisfied, unless the *Grant* arrived in time for the purposes of the *St. Patrick's* voyage, the plaintiffs must have a new trial. Now it cannot be disputed, that the condition would have been satisfied had the *Grant* arrived at *Guyaquil* on the 119th day, and yet that could not have been of any service to the freighters of the *St. Patrick*, which vessel was then at *Lima*. The construction put upon this instrument cannot, therefore, be correct. Looking at the instrument itself, no line can be drawn, except the arrival of the *Grant* in the course of her then voyage. She did arrive in the course of that voyage, and thereby satisfied the proviso in the charter of the *St. Patrick*. The object of the voyage of the latter vessel cannot be taken into consideration in construing the charter-party, wherein it is not mentioned.

ABBOTT C. J. I am of opinion that there ought not to be a new trial in this case. I left it to the jury to say whether the delay of the *Grant* had been occasioned by the default of the defendants; and observed that, if it had, her non-arrival would not be a sufficient answer to the action. They thought that the defendants had not occasioned it. The next point is the construction of the charter-party; and if my opinion upon that was erroneous, the plaintiffs must have a new trial. My opinion was, that it meant such an arrival of the *Grant*

as

as would answer the purposes of the parties to the charter-party. It is said that the only limit is arrival in the course of that voyage; but that might be so late as not to answer the purposes plainly designated by this instrument. Looking at that instrument alone, I still think as before, that the arrival of the *Grant*, in order to satisfy the proviso, should have been within the 120 running days, or the twenty additional days, during which the ship might be detained on demurrage, if the captain was required to wait so long.

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BAYLEY J. This case turns chiefly, if not entirely, upon the meaning of the term "non-arrival." It may have an indefinite meaning; then it would be a mere wagering bargain between the parties; but it may also mean non-arrival within such time as may answer the purposes of the *St. Patrick's* voyage. The latter is, I think, the correct construction; and then, in order to satisfy the proviso, the arrival should have been within the stipulated running days, or such further period as the captain of the *St. Patrick* chose to remain on the coast; for, in the latter event, it would have been an arrival available to the freighters of that ship. If the term "non-arrival" is to be construed indefinitely, it would be totally unconnected with the purposes of the charter-party on which this action is brought, and there could have been no reason for inserting it. But in all probability the parties contemplated such an arrival of the *Grant* as would be subservient to the purposes of the freighters of the *St. Patrick*, and in default of such arrival this charter-party might be altogether useless to them. It is probable that both parties thought the *Grant* would arrive before the *St. Patrick*. If the *Grant*

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had not arrived within the 140 days allowed for running days and demurrage, the captain of the *St. Patrick* might still have waited, and I think that, if he had, the arrival of the *Grant* during such stay would have satisfied the proviso, and have entitled the owners to claim the freight agreed for by the charter party.

BEST J. (a) I am of opinion that there is not any ground for disturbing the verdict in this case. The jury have found that the delay of the *Grant* was not attributable to the defendants. The remaining question depends upon the construction of the charter-party. It appears to me that the conduct of the plaintiffs has put an end to their claim. I agree that, if the *St. Patrick* had waited until the arrival of the *Grant*, the owners would have had a right to insist upon her being laden with a cargo for the homeward voyage. It may be true, that the voyage spoken of in the proviso was the voyage on which the *Grant* was then proceeding. It is also true that she did arrive at *Guyaquil* in that voyage, but before her arrival, the captain of the *St. Patrick* had put it out of his power to fulfil the objects of the charterers. It has been argued that they were bound to load her within 120 days, and certainly there is a stipulation to that effect in one part of the charter; but that is altogether inapplicable to the proviso, for until the arrival of the *Grant*, it could not be known whether that instrument would or would not be void. Now before the *Grant* arrived, the captain of the *St. Patrick* had made a new bargain, and had abandoned the ori-

(a) Hoyle J. was in the Bail Court,

ginal contract; the defendants, therefore, were not bound to provide a return cargo, and consequently the plaintiffs have no right to recover in this action.

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Rule discharged.

AMORY and Another *against* MERYWEATHER.

DEBT on bond, bearing date the 13th *May*, 1822, for 1000*l*. Plea, first, (after craving oyer of the bond and condition which was for the payment of 500*l*. by two instalments, the first of which became payable on the 13th *May*, 1823,) non est factum. Secondly, that on the 18th *May*, 1817, the defendant, by *M. White*, as the agent and on the behalf of the defendant, made and entered into divers, to wit, one hundred unlawful contracts and agreements with persons to the defendant unknown, for the buying and selling of shares in a public stock or security of this realm to the amount of 10,000*l*. three per cents., to wit, at, &c. Averment, that the contracts were not specifically performed, but that afterwards, to wit, on, &c., at, &c., he, the said *M. White*, did, as the agent and on the behalf of the defendant, voluntarily pay and give the sum of 500*l*. to the said

Debt on bond, conditioned for the payment of money by instalments.

Plea, that defendant, by *W.*, as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that *W.*, as the agent of the defendant, voluntarily paid 500*l*. for differences against the form of the statute, and that for securing the repayment of that money to *W.*,

the defendant gave his promissory note to *W.*, and that long after the same became due. *W.* indorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion, and for the purpose in the plea mentioned: Held, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given.

At the trial, it appeared in evidence that the note was given to *W.* to cover a sum which he, as broker, was to pay for losses on stockjobbing transactions: Held, that this evidence did not support the plea which stated that the note was given to secure the repayment of money actually paid by *W.*

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persons, with whom the said contracts had been made, for satisfying the respective differences for the not performing by the defendant of the said contracts, contrary to the form of the statute, and thereupon *for securing the repayment to White* of 499*l.* 10*s.*, parcel of the sum of 500*l.* so voluntarily paid by *M. White*, and for no other purpose; defendant, on, &c., at, &c., at the request of *White*, made his promissory note, and thereby promised to pay three months after date to *White* or order 499*l.* 10*s.* That *White* indorsed the note to the plaintiffs, they knowing *that it had been made by the defendant, on the occasion and for the purpose aforesaid*; that after the note became due, the plaintiffs threatened to commence an action upon the note against the defendant, and thereupon the defendant gave the bond in lieu of the note and the money secured thereby. The third plea stated the making of the unlawful contracts, and that *White* paid 500*l.* for differences, and that for securing the repayment thereof to *White* defendant gave his promissory note, and then proceeded as follows: “ that before the payment of the note, and long after the same had become due and payable, according to the tenor and effect thereof, to wit, on the 1st of *January*, 1820, *White* indorsed the note to the plaintiffs. That afterwards, to wit, on the 13th *May*, 1822, to wit, at, &c., the plaintiffs threatened to commence an action against the defendant for the recovery of the money in the note mentioned; and thereupon the defendant, in fear of the said action, did, at the request of the plaintiffs, to wit, on, &c., at &c., make and seal, and as his act and deed, deliver to the plaintiffs the said writing obligatory in the declaration mentioned, and the plaintiffs then and there accepted and received the said writing obligatory in lieu of the

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the said last mentioned promissory note, and of the said sum of money so purporting to be secured thereby as aforesaid, including also therein the sum of 5*l.* 5*s.* for the stamp impressed on the said writing obligatory and the costs thereof, and on no other account and for no other consideration whatsoever, the plaintiffs then well knowing that the said promissory note in that plea mentioned, had been made and drawn, and delivered by the defendant on the occasion and for the purpose in that plea mentioned, and on no other account or occasion." At the trial before *Abbott C. J.* at the *London* sittings after last *Easter* term, the execution of the bond was admitted, and *White* was called as a witness on the part of the defendant, and he proved that the note was given to him to cover a sum which he, as broker to the defendant, was to pay for losses on stockjobbing transactions. In *May*, 1819, he being in want of money, indorsed the note to the plaintiffs as a security for money which they advanced to him, but did not then inform them of the consideration upon which the note was given; but they were informed of it before the bond was executed. Upon this evidence, the Lord Chief Justice directed a verdict to be found for the plaintiff on the second plea, inasmuch as the averment in that plea, that notice of the illegality of the note was given to the plaintiffs when they took the note, was not proved. He was further of opinion that the third plea was not proved, inasmuch as it alleged that the note was given to secure to *White* the repayment of money paid by *White* for compounding differences, whereas it appeared by *White's* evidence, that the note was given before the differences were actually paid. But it was contended that it was substantially proved, and a verdict was found for the plaintiffs on the first and
second

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second issues, and for the defendant on the last issue, with liberty for the plaintiff to move to enter the verdict for him on that issue, and in the event of his not succeeding in that rule, to move for judgment non obstante veredicto, on the ground that the bond was good, although the plaintiffs could not have sued on the note. A rule nisi had been obtained by the Attorney-General for entering the verdict for the plaintiffs on the last issue, or for judgment non obstante veredicto.

Scarlett shewed cause. The third plea is good, and was made out in proof. The defendant, therefore, is entitled to judgment on the whole record. It appears upon the plea that the bond was given as a substitution for a promissory note, which had been indorsed to the plaintiffs two years after it was due. As against these plaintiffs the defendant, therefore, would be entitled, in an action on the note, to avail himself of every defence which he would have had against the original holders. *Brown v. Turner.* (a) It is averred that the plaintiffs had notice of the illegality of the original consideration before the bond was given. Here, therefore, the plaintiffs, holding a promissory note which they knew to be void, (because it was given to secure money paid for differences on stock-jobbing transactions,) took the bond in lieu of it. *Cannan v. Bryce* (b) is an authority to shew that that bond is void. Secondly, the plea was supported by the proof: it was necessary in the plea to state facts sufficient to shew that the plaintiffs could not recover, and it sufficed to prove substantially the facts stated. When a plaintiff sets out a con-

(a) 7 T. R. 630.

(b) 3 B. & A. 179.

tract specially, he can recover only on the contract as set out, and must, therefore, prove it literally; but it is otherwise where the contract is not specially stated. Here the substance of the plea is that the note was given to pay differences on stock-jobbing transactions, and that has been proved. It is wholly immaterial whether those differences were paid before or after the note was given. It would have been sufficient to allege that the note was given *for and in respect of* differences, &c. That is the substance of the allegation in the plea.

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The *Attorney-General* contra. There can be no doubt, that by omitting or altering words the plea might be made to correspond with the evidence. The facts alleged have not been proved. The plea is, that *White* having paid the differences, the note was given to him for securing the repayment to him of that money which he had actually paid. The proof is, that the note was given to *White* to secure to him money which he had not then paid, but which he was to pay. Assuming the plea to be proved, still the plaintiffs are entitled to judgment, non obstante veredicto. Here it is alleged that the plaintiffs took the note from *White* after it was due, but without knowledge of the original consideration. It would undoubtedly have been a good defence to an action on the note, that it was originally given to secure money to be paid in respect of illegal stock-jobbing transactions; but it is no defence to an action on the bond, which is a new security, and not made between the parties to the illegal contract. In *George v. Stanley* (a) the defendant had given bills for the

(a) 4 Taunt. 683.

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amount of money lost at play: these bills were negotiated and came to the hands of the plaintiff, and when they became due the defendant gave in lieu of them other bills, and when these last bills became due, he confessed a judgement, which the court refused to set aside, unless it were shown that the holder of the bills had notice of the illegality of the original consideration. [*Holroyd J.* Here the note was indorsed after it was due, and that is a suspicious circumstance, from which the law infers, that the party taking the note had knowledge of some infirmity in the title of the holder, and the indorsee then takes it, subject to all the objections to which it was liable in the hands of the person from whom he took it.] In *Cuthbert v. Haley (a)* one *Plank* had discounted certain promissory notes of *Haley's*, and took usurious interest upon them, and then deposited them with his bankers, who gave him credit for them. When they became due, *Haley* not being able to pay, gave the bankers his bond. The latter had no knowledge of the usury between *Plank* and *Haley*. It was held that the bond was good.

ABBOTT C. J. There is a great distinction between the two cases. Here the plaintiffs took the promissory note after it was due. There was no period of time when they could have maintained an action upon the note, and they had notice of the illegality of the original consideration before the bond was given. In *Cuthbert v. Haley*, the bankers had no knowledge of the usury at the time when the bond was given, and Lord *Kenyon*, in delivering his judgment, relies upon that circumstance. We are all of opinion that, as it appears

(a) 8 T. R. 590.

upon the plea that the bond was given as a substitution for a note which was taken by the plaintiffs, subject to an infirmity of title of which they had full notice before the bond was taken, the latter instrument is void. The rule, therefore, for entering up judgment for the plaintiffs, non obstante veredicto, must be discharged. We also think that the third plea is not supported by proof; but the defendant may have leave to amend his plea upon paying the costs of the trial, with liberty to the plaintiffs to reply de novo. (a)

(a) No rule had been drawn up at the time when this case was printed.

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against
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HEAFORD *against* KNIGHT.

Thursday,
February 6th.

DENMAN shewed cause against a rule obtained by *Hutchinson*, for staying proceedings until security was given for costs. The defendant's affidavit, on which the rule was obtained, stated the following circumstances. Issue was joined in *Hilary* term, 1822, and notice of trial given for the adjourned sittings after that term. That notice was afterwards countermanded, and on the 13th of *May* following the plaintiff was discharged under the Insolvent Act. The sum claimed from the defendant was inserted in the plaintiff's schedule as a debt due to him, and an assignment was made in the usual form to the provisional assignee of the court. The second notice of trial was given on the 15th of *January*, 1823. The defendant also swore that he had a good defence on the merits.

Where the plaintiff was discharged under the insolvent act after issue joined, and before notice of trial given, the Court stayed the proceedings until the assignee, or some creditor of the plaintiff, should give security for costs.

The Court ordered the proceedings to be stayed until the assignee or some creditor of the plaintiff should give security for the costs.

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Wednesday,
February 12th.

WOOLLEY against WHITBY.

A certificate that a trespass was wilful, to entitle plaintiff to his full costs under the 8 & 9 W. 3. c. 11. s. 4., need not be granted immediately after the trial of the cause.

TRESPASS quare clausum fregit. Plea, not guilty.

At the trial before *Warren, C. J. of Chester*, and *Marshall Serjt.*, at the last *Chester* assizes, the plaintiff obtained a verdict, damages 5s., and it appearing that the trespass was committed after notice, the plaintiff's counsel requested the learned Judges to certify that the trespass was wilful, so as to entitle the plaintiff to full costs under the 8 & 9 W. 3. c. 11. s. 4. No certificate was at that time granted, but in *Michaelmas* term *Warren C. J.* certified, *Marshall Serjt.* being then dead. The costs were accordingly taxed and levied under an execution. A rule was afterwards obtained to set aside the certificate, judgment, and execution, and to have the money levied returned to the defendant: against which

D. F. Jones now shewed cause. It must be admitted, that the case of *Ford v. Parr and Another* (a) is in favour of the defendant. But in *Tidd's Practice* (b) several other cases are referred to, and he states the result of them to be, that the certificate required by the statute in question need not be granted at the trial of the cause; and he cites a case of *Swinnerton v. Jervis*, which is not reported. [*Holroyd J.* It is mentioned in *Reynold v. Edwards*. (c)] In *Butler v. Cozens* (d), it was taken

(a) 2 Wils. 21.

(c) 6 T. R. 11.

(b) 1002. 6th edit.

(d) 11 Mod. 198.

for granted, that the judge might certify under the 22 & 23 *Car. 2. c. 9.*, at any time after the trial. The words of the statute now in question will be satisfied, if it appear at the trial that the trespass was wilful, although the certificate be not granted until a future time. [*Bayley J.* There is a difference in the language of the first and fourth sections, which is in favour of that construction.]

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J. Williams and Campbell, contra. Mr. *Tidd* certainly states that the certificate need not be granted at the trial, but he is not justified in assuming so much to have been proved by the cases which he cites. *Reynolds v. Edwards*, and two cases there referred to in a note, were questions as to the power of the judge, in granting or withholding a certificate at his discretion. *Ford v. Parr and Another* is expressly in point for the defendant; and in *Hullock on Costs (a)* it is said, that the certificate, in order to be available, must be granted in court at the trial. This construction is also confirmed by the first section, which requires the certificate there mentioned to be granted immediately after the trial in open court. Now the first and fourth sections of this statute are in *pari materiâ*, and no sufficient reason can be given for making any difference between them; they should therefore receive the same construction.

ABBOTT C. J. Had there been any clear and distinct report of a case upon this subject, or had the subsequent practice followed the case of *Ford v. Parr*, which

(a) 99. 2d edit.

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has been referred to, we should have felt bound to abide by it. The report of *Ford v. Parr* leaves open to us the supposition, that the attention of the court was not drawn to the fourth section of the 8 & 9 W. 3. c. 11., for the judges are made to say, that the certificate must be granted "in open court at the trial." Now that is required by the first section, which relates to a matter totally different, and the expression is not repeated in the fourth section, upon which this question depends. Since the decision of the case alluded to, the opinion both of the court and the bar seems to have been, that the certificate might be granted at any time after the trial. In *Gundry v. Sturt* (a), it certainly was so considered, and in *Good v. Watkins* (b), where a very extraordinary motion was made to compel the learned judge (*Le Blanc*) who tried the cause to grant a certificate, it was never made an objection, that it could not be granted at any time after the trial. Let us look at the act itself. In the first section it is enacted, that where one or more of several defendants, in certain actions there enumerated, shall be acquitted by verdict, every person so acquitted shall be entitled to costs of suit, in like manner as if all the defendants had been acquitted, unless the judge before whom such cause shall be tried, shall, *immediately after the trial thereof, in open court* certify upon the record under his hand, that there was a reasonable cause for making such person or persons a defendant or defendants to such action. On that section no doubt can be entertained. The certificate must be granted in open court immediately after the trial. Then the fourth section, which is now in question, enacts, "That in all

(a) 1 T. R. 636.

(b) 3 East, 495.

actions of trespass wherein, at the trial of the cause it shall appear and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit." It is said, that these two sections being in *pari materiâ*, are to have the same construction. I am of opinion, on the contrary, that the application of different words to similar matters shews that they were intended to have a different construction. The sound construction of the enactment appears to me to be, that if at the trial the trespass appears to have been wilful, the judge may grant his certificate at any convenient time. This certainly is the most proper construction, inasmuch as it gives the judge time for consideration, which he ought to have for the due exercise of the discretion vested in him by the statute. This rule must, therefore, be discharged.

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 against
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Rule discharged. (a)

(a) In *Harper v. Carr*, 7 T. R. 448., it is said to have been decided in *Swinnerton v. Jervis*, that a certificate under 8 & 9 W. 3. c. 11. s. 4. need not be granted at the trial.

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**The King *against* The Mayor, Recorder, and
Aldermen of the Borough of FOWEY.**

By charter, a borough was constituted a body corporate, to have perpetual succession, by the name of the mayor and free burgesses of the borough of F. Nine of the free burgesses were to be chosen aldermen. One of the aldermen was to be called mayor. The mayor and aldermen were to form the common council; a person learned in the laws of Eng-

land was to be recorder. The charter then authorised the mayor and recorder, or their respective deputies, and the rest of the aldermen of the borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time, and at all times thereafter, as often, and when to them should seem fit and necessary, to nominate, choose, and prefer so many, and such persons to be free burgesses of the borough, as they pleased, and to those free burgesses so to be chosen, to administer an oath for their fidelity to the borough. Nine persons were nominated as the first aldermen, one person as recorder, and five persons the first free burgesses; and in case any one or more of the aldermen should die, or be removed from his office, the mayor, recorder, justices of peace, and the rest of the aldermen, or the greater part of them, to elect one other of the free burgesses, inhabitants of the borough, for an alderman, to supply the number of nine. The alderman so chosen taking the oaths before the mayor, recorder, or one of the justices of the peace of the borough for the time being, or before two or more aldermen, or for want of mayor, recorder, justices, and aldermen, before three or more free burgesses, inhabitants of the borough, to execute the office, and the mayor, the ex-mayor, the recorder, and their deputies, and the senior alderman and the senior free burgess were to be justices of the peace. It appeared by affidavits that the body corporate had for three years been reduced to the number of six aldermen and four free burgesses, and that one of the aldermen was in a dangerous state of health, and was upwards of seventy years of age, and incapable of performing the duties of alderman and justice of the peace; that of the four burgesses, two were upwards of seventy years of age, and that another was not an inhabitant of the borough. The Court refused to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election.

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and that one of the most honest and discreet aldermen of the borough, to be chosen as therein mentioned, should be called mayor; and that the mayor and aldermen for the time being should be called the common council of the borough; and that there should be one honest and discreet man learned in the laws of *England*, who should be called recorder. There then followed this clause, “that it should be lawful for the mayor and recorder, or their respective deputies, and the rest of the aldermen of the said borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time and at all times thereafter, as often and when to them should seem fit and necessary, to nominate, choose, and prefer so many and such persons *to be free burgesses* of the said borough as they pleased, and to those free burgesses so to be chosen to administer the oath for their fidelity to the said borough, and all things faithfully to do which belong to the place of free burgesses to be done. The charter then proceeded to nominate *G. G. White* the first and modern mayor of the borough, and *J. Kimber, T. Graham, T. Orchard, W. Rashleigh, J. Bennett, J. Hallett, J. Messer, G. G. White,* and *Robert Hearle*, to be the first and modern aldermen of the borough, to be continued in that office for their lives, &c. unless, &c. The charter then nominated *G. Lacy* to be recorder during his life, and as long as he should behave well. It then nominated *R. P. Flamank, C. Bennett, N. Eveleigh, G. Thomas,* and *T. Nickells*, to be the first and modern free burgesses of the borough, to be continued in that office during their lives, unless, &c.; and in case any one or more of the aldermen of the borough for the time being should die

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or be removed from that office, that it should be lawful for the mayor, recorder, and justices of the peace, and the rest of the aldermen of the borough for the time being, or the greater part of them, to elect and prefer one other or more of the free burgesses, inhabitants of the said borough, for an alderman or aldermen of the said borough, in the place or places of him or them so happening to die or be removed, to supply the said number of nine aldermen of the borough aforesaid; and that he or they, so as aforesaid elected or preferred to the office or offices of alderman or aldermen of the said borough, the office or offices should have and exercise during his or their natural life or lives, unless, in the meantime as aforesaid, for ill behaviour or any other offence he or they should be removed; he or they so chosen first taking his or their corporal oath or oaths before the mayor, recorder, or one of the justices of the peace of the said borough for the time being, or before two or more of the aldermen of the said borough. And for want of mayor, recorder, justices, and aldermen (and not otherwise) before *three or more free burgesses*, inhabitants of the said borough for the time being, well and faithfully to execute that office in all things thereunto belonging. The charter then enabled the recorder to appoint a deputy and the mayor, the ex-mayor, the recorder, and the deputies of the mayor and recorder for the time being, and also the senior aldermen of the said borough and the senior free burgess of the said borough, were made justices of the peace. The affidavit then stated that the several persons named in the charter as mayor, recorder, aldermen, and free burgesses, respectively took the oaths, &c.; and that the charter had in all other respects been accepted and put in execution; that

that for the last three years the body corporate had been, and still was, reduced to the number of six aldermen and four free burgesses; that of the six aldermen, one *J. Kimber* was in a very dangerous and precarious state of health, having had a paralytic stroke, and being upwards of seventy years of age, and that from such age and infirmities he was incapable of attending to his duties as an alderman and justice of peace; that of the remaining four free burgesses, one *T. Nickells* was upwards of seventy years of age, and was in a very infirm and dangerous state of health; that another, viz. *R. P. Flamank*, was also seventy years of age; and that another, *N. T. Eveleigh*, was not an inhabitant of the borough, and therefore not qualified to be elected an alderman according to the charter; that in consequence the said body corporate had been for some time and still was in great danger of being dissolved.

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Wilde in the last term had obtained a rule nisi for a mandamus, directed to the mayor, aldermen, and recorder, commanding them to proceed to the election of a competent number of free burgesses of the borough, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election.

Adam and *Bernard* now shewed cause. A mandamus will not lie to compel a corporation to elect members of an indefinite body. It issues only in cases of necessity, and to supply a defect of justice. There is no case in the books in which such a writ as that now asked for has been granted. In *Buller's N. P.* 201. it is laid down, "that where by charter or prescription the corporate body ought to consist of a *definite* number, and they neglect to fill up

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the vacancies as they occur, the Court will grant a mandamus." From this passage it may be inferred to have been the opinion of the learned writer, that a mandamus would not lie to compel a corporation to elect members of an *indefinite* body. So a mandamus will not lie to do an act which a party may do or not at his discretion. Per *Holt, Comyns's Dig. Mandamus*, B 1. In the *Queen v. Heathcote (a)*, *Eyre J.* says, all writs of mandamus are either to restore persons turned out, or to admit persons refused. In *Rex v. Pateman (b)*, it was stated in argument at the bar as a clear proposition, that a mandamus would not lie to compel the corporation of *Bedford* to fill up the office of alderman, because the number was *indefinite*. These authorities shew that the general opinion in the profession has been, that a mandamus does not lie to compel a corporation to elect members of an indefinite body. But, secondly, there is no necessity in this case for granting a mandamus. For if it be refused, there is no danger of the dissolution of the corporate body. It is true, that if an integral part of a body politic be destroyed, and *the remaining parts have no power to restore it*, the corporation is dissolved, because it has lost an essential attribute, viz. capability of perpetual succession, *Rex v. Pasmore. (c)* But in this case, if all the free burgesses became aldermen, the corporation would still be in no danger of dissolution, as the mayor, recorder, and aldermen would be competent to nominate, choose, and prefer such persons to be free burgesses as they pleased. Free burgesses are necessary only for two purposes: first, as a body out of which the alder-

(a) 10 *Mod.* 54.(b) 2 *T. R.* 777.(c) 3 *T. R.* 199.

men are to be chosen ; and secondly, for the purpose of assisting at the election of a mayor on the charter day. Now, assuming that all the present existing free burgesses were made aldermen, it would be competent to the latter body to proceed immediately to elect free burgesses, but there is no present duty in the now court of aldermen to proceed to the election of free burgesses before the vacancies in the court of aldermen are filled up ; and it would be contrary to the spirit of the charter to compel them so to do. For the aldermen are a definite body consisting of nine, and the free burgesses are to be elected by the mayor, recorder, and aldermen. The charter contemplated, therefore, that the free burgesses should be elected by a majority of the nine aldermen. Now, if the present mandamus were granted, the election of free burgesses would be by a majority of five ; but it is obvious, that the course to be pursued according to the spirit of the charter in the present circumstances of the corporation is, first, to fill up the vacancies in the definite and electoral body of aldermen ; and then, when that body is complete, secondly to proceed to the execution of its functions by nominating, choosing, and preferring such persons to be free burgesses as the majority of that perfect body shall think fit.

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Gaselee and Wilde contra. By the charter a present duty is created in the aldermen to elect free burgesses, or at least to meet to consider of the propriety of making such election. The charter appoints nine aldermen. Of these offices three are now vacant, and there are only three efficient free burgesses. Consequently, if all the vacancies in the court of aldermen were filled up,
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there would not be any efficient free burgess left. Although it has never been decided that a mandamus will lie to compel a corporation to elect members of an indefinite body, yet, if there be a duty to fill up vacancies in such a body for the purpose of perpetuating the corporation, then a mandamus will lie, because it is necessary for the purposes of justice. It is incumbent on those who apply for a mandamus in such a case to shew that the necessity exists, or in other words, that the charter will be defeated unless the election take place. Now in this case, unless the aldermen elect more free burgesses, the corporation is likely to be dissolved. Free burgesses are a necessary constituent part of the corporation. The senior free burgess is to be a justice of the peace, and in the absence of the mayor, recorder, and aldermen, certain oaths are to be administered by three free burgesses. The charter, therefore, contemplated that there should be always three free burgesses, and although there are that number at present, yet if the vacant offices be filled up, there will not be any efficient free burgess left. Besides, there ought to be a sufficient number of free burgesses to afford the aldermen the means of selection for filling up vacant offices in their body. But here, there being only three to fill the same number of vacant offices of aldermen, the latter will be filled by succession, and not by election as the charter directs.

ABBOTT C. J. I am of opinion that we ought to discharge this rule. There is no instance in which the court has ever granted a mandamus to compel a corporation to elect members of an indefinite body. The general principle of the Court, in issuing a mandamus, is

is very well defined to be, that whenever it is the duty of a person to do an act, the Court will order him to do it. The question is, whether, in the present state of the corporation, there is an imperious duty upon this body to proceed in the first place to the election of free burgesses. In this case, by the charter, there are nine aldermen, and an indefinite number of free burgesses, with a power for the corporation, from time to time, as they think fit, to elect persons to become free burgesses, and five are named free burgesses, and there are at present at least three free burgesses against whom there is no objection. Now, the following acts are to be done by the free burgesses: first, the senior is to be a justice of the peace. Secondly, they are to concur with the aldermen in the election of the mayor, and three of them are competent to do that. And in the absence of the mayor, recorder, and aldermen, they are to administer the oath to the persons elected aldermen, and three free burgesses may administer the oath. There are three, therefore, to administer this oath, if it be requisite for them to do so. Then the question really comes to this, whether we shall order the corporation to elect free burgesses before they proceed to the election of aldermen. There is a sufficient number of free burgesses remaining to fill up the vacancies occasioned by the loss of the aldermen; but it is said, that if all the vacancies were filled up, there would be no efficient free burgess remaining, for that the one remaining is incapable of acting in the discharge of his duty. That may be so, but at present there does not appear to me to exist any necessity for granting this mandamus. It is said that we ought to make them elect free burgesses, in order to give the aldermen a more numerous class of free

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free burgesses, from whom they may choose the new aldermen, and thus give them a greater number of persons, out of whom the choice may be made; but I do not know how we are to do that, for what greater number are we to give? Will five be sufficient, or twenty? The greater the number, there is certainly more opportunity of choice and selection, but we cannot say what number they ought to elect, with a view of giving a sufficiently large class out of which the aldermen may be chosen. It is worthy of observation, too, that the present free burgesses are those originally appointed by the charter of the crown, which directed the aldermen to be filled up out of the burgesses, and, therefore, the crown having proposed those five persons to be made free burgesses, considered them to be fit persons to fill the office of aldermen when vacant. Unfortunately this corporation have allowed a large number out of the nine offices of aldermen to become vacant, without filling up any one, and it may be that delay may have the effect of leading to a dissolution, but I cannot say that it will have that effect. If a mandamus were to issue to elect, and it was duly served upon all those whose duty it is to be present at such an election,

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BAYLEY J. For a considerable period of time my impression was, that we ought to grant a mandamus in order that a court might be held at which the corporation might exercise their judgment as to whether they would elect free burgesses or not, and whether they should elect burgesses before they went to the election of aldermen. But, upon consideration, it seems to me that we ought not to interfere at all; “vigilantibus et non dormientibus jura subserviunt” is a very good and useful rule, and one which may with propriety be applied to corporation cases. In this case there appears to me to have been great negligence in those persons on whose behalf this application is made. It was the duty of the existing corporation, as soon as a vacancy occurred, to have insisted upon its being filled up forthwith, and if that had been done then, inasmuch as the charter directed that the aldermen should be filled up out of the existing burgesses, and no new burgesses had been elected, the choice must have attached upon one of the then existing burgesses, and as soon as the vacancies were filled a majority of the nine must have concurred in deciding whether there should be any more free burgesses or not; and when a second party died the same question would have been again raised. Here, however, the parties have thought fit to wait until the number of aldermen has been reduced nominally from nine to six, and substantially to five, and, consequently, there are now in this corporation, when there ought to have been nine aldermen, five only. Now the charter has said, that it shall be in the judgment of the nine whether there should be any and what free burgesses; and if in this case we were to grant the mandamus, the new free burgesses would be elected,

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not by a majority of nine, but by a majority of five, which, as it seems to me, would be working some injustice, because that might entirely supersede the inchoate rights which the present existing burgesses originally obtained. For if, when the first vacancy had occurred, they had proceeded to an election, it is morally certain the choice must have fallen upon one of those, whereas, if the majority of the existing body are inimical to the interest of the present existing burgesses, you may have an entirely new set of burgesses, not named in the charter, elected to the vacant offices of aldermen. For these reasons I think the rule ought to be discharged.

HOLROYD J. I am of the same opinion. By the charter, the mayor and aldermen are to elect such and so many free burgesses as they shall think fit. It is not competent, therefore, to the Court to grant a mandamus directing them to elect any. Whether a mandamus may be granted to compel the persons who, by the charter, were appointed to elect, to attend, in order to form a meeting to consider what free burgesses should or should not be elected, is another question. Without saying whether a mandamus would lie in such a case or not, I certainly doubted very much whether, supposing it would lie, this case was not a fit case for it to be granted. The result of the consideration which I have given to the subject is, that it ought not to be granted under the present circumstances; for although there are five free burgesses named in the charter, they are not to be considered as a definite body, for by the preceding part of the charter the mayor and aldermen may elect such and so many as they shall think fit; but in order that
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in the meantime there should not be wanting a body of free burgesses, the charter nominates five, but it does not, as in the case of aldermen, direct that there shall be any election to supply the places of the five burgesses nominated. It seems to me, therefore, to be an indefinite body, of which the crown, in the first instance, nominated five, the number being to be indefinite, according to the will of the corporation, always supposing the members to act properly in the discharge of their duty. With respect to the aldermen, I take it to be the duty of the corporation, within a reasonable time after a vacancy in the number of aldermen has occurred, to fill up that vacancy, so that the body of nine should be completed, in order that the functions of aldermen and mayor (the mayor being one of the nine) should be performed, and that the town might have the benefit of the whole body to perform those functions. The question in this case seems to be, whether the election of free burgesses shall be by the majority of the five or six aldermen now existing, or whether it should be by a majority of the whole number of nine. If the present mandamus is to be granted, it could only be to consider whether they will elect or not; and even if they then determined to elect free burgesses, the election could not be by the full number of aldermen, whereas, if we require the aldermen to fill up the vacancies in their body in the first place, that would be agreeable to the intention and provisions of the charter. It appears to me, therefore, that the present mandamus ought not to be granted.

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BEST J. Although I entertain some doubts upon this question, the inclination of my opinion is, that the
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mandamus ought to be granted. Undoubtedly it was the duty of the aldermen, from time to time, to fill up vacancies; but, assuming that they were culpable in not filling them up, I think that is not any reason why we should not grant this mandamus, for this is not a question in which the interests of the aldermen only are to be considered, but the interests of the town; and those interests ought not to suffer from the negligence of any member of this corporation. It is said, that we have not the power to grant this mandamus. If this application had been made a century ago, it would not probably have been granted, for at that time a mandamus was held to lie only to compel the performance of a ministerial duty, but modern cases have gone much further, and a mandamus now will lie for the performance of any public duty. In *Buller's N. P.* 201., it is said, that where by charter or prescription the corporate body ought to consist of a definite number, and they neglect to fill up the vacancies as they happen, the court will grant a mandamus, and the reason of that is, because the filling up of the definite body is necessary to give perpetuity to the corporation. Now if the same reason applies to an indefinite body, it follows, that the court ought to grant a mandamus to elect the members of that indefinite body. In this case, it appears to me, that in order to prevent the dissolution of this corporation, it is necessary that free burgesses should be elected. The king, by his charter, has granted that the body should be perpetual. It is therefore necessary for every component part of that body politic to do all that is essential to the preservation of the corporation. Now what is essential to its preservation? Not a mere formal election, but a substantial election of the members
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of that corporation. Is not this corporation reduced to a state in which, if an alderman died, new free burgesses could not be elected? Besides, the three existing free burgesses may force themselves into the court of aldermen, and every one of them may be incompetent to fill that office. There are now, indeed, four free burgesses, of whom one is a non-resident: but supposing there were only two, those two could force their way into the court of aldermen. I agree that we are bound to assume that these persons were duly competent to fill the office of free burgesses, because they are nominated in the charter, but a man may be fit to be a free burgess, and not fit to be an alderman. The latter is an office of magistracy, and the person who is fit to be a free burgess may be unfit to exercise the functions of a magistrate. With respect to inchoate rights I cannot agree that a person is to be elected because he is eligible. A man may be eligible, and still not have a right to be elected. It seems to me, that whenever a corporation is reduced to that state in which there is no choice of persons to fill up the offices which by the charter are directed to be filled up by election, it is then in a state in which it is necessary for the court to interfere to compel them to do all that is necessary, in order that something like a free choice may take place. There cannot be any free choice in this instance. Although at present it appears that there are three persons eligible, still that will not bear the name of election; it is succession; and the moment that the three succeed the corporation will be entirely at the mercy of the majority of the whole. It seems to me to be a clear principle of law, that where there is a strong political necessity for an act to be done, this Court has a right

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to require that it shall be done; and I think also, that in this case there exists that degree of necessity. From the cases which have been cited, it appears that it has never been decided that a mandamus does not lie to compel the election of members of an indefinite body. Then, does not the principle upon which the Court has proceeded apply to an indefinite body, when reduced to one or two, as strongly as to a definite body? With respect to the dictum of *Eyre J.* cited from 10th *Modern*, I cannot admit that to be law, because that would equally prevent the court from adding to the number of a definite body. The true principle is, that this prerogative writ shall be granted in all cases where the justice of the country requires that it should be granted. If justice does not require it to be granted, the granting of it would be an abuse of the power vested in the Court. But if we see that justice will be defeated if it is not granted, we are not to be fettered in the exercise of our authority, by being told that in ancient times such a writ would not have been granted. For these reasons, it appears to me that the rule granting a mandamus ought to be made absolute.

Rule discharged.

The KING *against* RAWSON and Others.

Where the defendants, in an indictment for misdemeanor, submitted to a verdict of guilty, upon an understanding that they were not to be brought up for judgment: Held, that the prosecutor was not entitled to costs, no agreement having been expressly made respecting them.

THE defendants were indicted for a riot and assault. At the trial at the last *Lancaster* assizes, before *Holroyd J.*, they submitted to a verdict of guilty, upon an understanding that they were not to be brought up

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for judgment. Nothing was then said about the costs. A side-bar rule for taxing the prosecutor's costs having been obtained, *Scarlett* moved to discharge that rule.

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Cross Serjt. shewed cause, and contended, that where defendants submit to a verdict of guilty, upon an understanding that they are not to be brought up for judgment, it is always considered a term in the agreement, that the prosecutor's costs shall be paid.

ABBOTT C. J. When a prosecutor agrees not to bring up a defendant for judgment, and expects in return to receive some advantage to which prosecutors in general are not entitled, he should take care to have it clearly expressed at the time. In such a case as the present it is certainly rather a nice point to decide, whether the prosecutor should have expressed his expectation of the costs, or whether the defendants should have particularly excluded them from their agreement. But upon the whole we all think that they should have been mentioned by the prosecutor.

Rule absolute for discharging the side-bar rule.

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Ex parte ALDRIDGE.

In a conviction under the 5 G. 4. c. 110., it is necessary that the offence should appear to have been proved on the oath of one or more credible witnesses, and therefore, where the conviction stated, "that *R. A.* was convicted of carrying brandy liable to seizure," (without saying upon oath) and proceeded, "and it is this day, in like manner, also proved, on the oath of *J. H.*, that the brandy was taken from *R. A.*, and that he was detained by an officer of the navy, &c.:" Held, that carrying the brandy was the offence, and as that was not stated to have been proved on oath, the conviction was bad, and that *R. A.* (having been committed to prison), was entitled to be discharged.

ROBERT ALDRIDGE, a prisoner in the gaol of *Hastings*, was brought up by writ of habeas corpus, and the gaoler set out in his return a warrant for the imprisonment of *Aldridge* in pursuance of the following conviction, which was brought up by certiorari. "Be it remembered, that on, &c. at, &c. *R. Aldridge* hath been duly convicted before me, *E. M.*, one of his majesty's justices of the peace residing near the place where the offence was committed, of having within three months last past, to wit, on, &c. at, &c. (he, the said *R. A.*, then and now being a subject of his present majesty,) been found carrying and conveying, and assisting in carrying and conveying, contrary to the form of the statute in that case made and provided, divers, to wit, eight gallons of foreign brandy, then and there subject and liable to forfeiture under and by virtue of an act of parliament relating to the revenue of customs and excise in the United Kingdom, for that the said brandy, being goods liable to the payment of customs and other duties, had been then and there unshipped with intention to be laid on land, customs and other duties not being first paid or secured, contrary to the form of the statute, &c. And it is this day in like manner also proved on the oath of *Joseph Hancock*, to and before me the said justice, that the said brandy was then and there, to wit, on, &c. at, &c. seized and taken from the said *R. Aldridge*; and that he, the said *R. A.*, (being a subject of his said majesty as aforesaid,) was then and there

there found, taken, stopped, arrested, and detained by one *J. G. F.*,; he, the said *J. G. F.*, then and there being an officer of his majesty's navy, and brought and carried before me the said justice, residing near to the place where the said *R. A.* was so found, taken, and arrested, and detained by the said *J. G. F.* as aforesaid; and that the said *R. A.* is not fit and able to serve in the navy; I do therefore adjudge that the said *R. A.* hath for such offence forfeited the sum of 100*l.*, pursuant to the act passed in the third year of *G. 4.*, entitled, &c." The return having been read,

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Platt moved that the prisoner might be discharged out of custody, for that it did not appear by the conviction that the offence with which the prisoner was charged had been proved upon oath by any credible or other witness.

Shepherd shewed cause. It is true, that in the first part of the conviction where the offence is stated, no mention is made of the evidence by which it was substantiated. But then it proceeds, "And it is this day *in like manner* also proved on the oath of *J. H.*, &c.:" it is therefore clear upon the whole, that the offence was proved on the oath of *J. H.*

ABBOTT C. J. I do not find any thing in this conviction to which the expression "in like manner" can refer. In the former part, the statement is merely that *R. A.* was convicted. It is not any where alleged that he was proved upon oath to have been found carrying and conveying the brandy. Now that is the offence of

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which he was convicted, and as it does not appear that the conviction proceeded upon proper evidence, the prisoner must be discharged.

Prisoner discharged.

The KING *against* Mayor, &c. of GRAVESEND.

Where the charter of a corporation provided that there should be a high steward and an under steward, and imposed upon the latter various judicial and ministerial duties, and did not give him power to appoint a deputy: Held, that he could not appoint a deputy generally to discharge all the ministerial duties of his office. Although a bye law of the corporation required that he "or his sufficient deputy" should attend at every court to execute the duties of the office.

Quære, whether he could have made such an appointment for the discharge of any particular ministerial duty?

A RULE had been obtained, calling upon the mayor, jurats, and inhabitants of the villages and parishes of *Gravesend* and *Milton*, in the county of *Kent*, to shew cause why a mandamus should not issue directed to them, commanding them to admit *F. Southgate* and *G. N. Rich* as deputies and nominees of *C. Vesey*, sub-seneschal or under steward of the said villages and parishes, to enrol and enter all indentures of apprenticeship of apprentices taken by the inhabitants of the said corporation, to enrol all freedoms of such apprentices, and to enter in a ledger or book the acts and matters agreed upon at any courts or assemblies of the said corporation, and to discharge all other ministerial duties belonging or annexed to the said office. It appeared by the affidavits, that by a charter of the 7 *Car. 1.*, the foreman, jurats, and inhabitants of the villages and parishes of *Gravesend* and *Milton*, in *Kent*, and their successors, were created a corporation by the name of the "Mayor, Jurats, and Inhabitants of the villages and parishes of *Gravesend* and *Milton*, in *Kent*." They were to have one capital seneschal or high steward, and one other person skilful in the laws of the kingdom, sub-seneschal or under-steward; that he should inhabit and reside in the villages and parishes aforesaid, unless the mayor, jurats, and

and inhabitants for the time being dispensed with it; and power was given to the corporation to make bye laws for declaring after what manner the mayor, jurats, and inhabitants, and their officers and ministers, should behave and demean themselves in their offices and functions. On the 20th of *March*, a bye law was made requiring that all inhabitants taking apprentices should bring their part of the indenture to the mayor to be signed and allowed, and that the sub-seneschal should then enrol it in a book kept for that purpose, and also should enrol the freedom of every person having served an apprenticeship of seven years, and then claiming his freedom. Another bye law, made at the same time, required, that all acts and matters agreed upon at any courts, &c. holden by the mayor, jurats, and common council of the corporation, touching or concerning the good or government of the same, should, by way of act or order, be forthwith drawn up and entered in some ledger or book, to be kept for that purpose by the under-steward of the corporation for the time being. That the said under-steward or recorder for the said corporation for the time being, or his sufficient deputy, should be attendant at every court of record holden before the mayor and jurats of the corporation, and there should well and faithfully, according to his utmost skill, do, perform, and execute all and every such thing and things belonging to his said office. On the 21st of *March*, 1822, the Hon. *C. Vesey*, Barrister at Law, was elected sub-seneschal of the corporation, and sworn in on the 8th of *April*, when his residence was dispensed with. The sub-seneschal appointed *Southgate* and *Rich*, attornies of the court of K. B., his deputies and deputy, to perform on his behalf the several minis-

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against
Mayor, &c. of
Gloucester.

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terial duties belonging to his office, and particularly those mentioned in the bye laws above set forth. *Southgate* and *Rich* required to be admitted to the performance of those duties, and on the 19th of *December*, 1823, presented themselves at a meeting of the corporation, when they were excluded from it. Besides the ministerial offices mentioned in the bye laws, the sub-seneschal had several judicial duties to discharge which were imposed upon him by the charter; he was to hold a court of record and act as a justice of peace. The charter did not give him power to appoint a deputy, and upon searching the muniments and records of the corporation for the last 200 years, it did not appear that any appointment had been made by the sub-seneschal or recorder of a deputy sub-seneschal or recorder.

Gaselee and *Chitty* were called upon to support the rule. It may be admitted that the sub-seneschal could not have appointed a deputy generally, inasmuch as he has to discharge certain judicial functions, and the charter has not authorised the execution of them by deputy. But the appointment in question is confined to ministerial duties, and the bye laws of the corporation authorise such an appointment, for they require the attendance of the sub-seneschal *or his deputy* for the purpose of discharging the duties of that office.

ABBOTT C. J. I am of opinion that this rule for a mandamus must be discharged. It is not a rule requiring that the deputy should be allowed to do some particular act, but that these applicants should be admitted generally to do all ministerial acts, which would be to make them corporate officers. The law of the
land

land does not allow such an appointment, unless it is provided for by the charter. Whether, if the appointment had been to do some particular act, and the corporation had allowed the deputy to do it, that would or would not have been valid, is a very different question. The sub-seneschal clearly had no power to introduce these persons into corporate meetings against the will of the corporation, and we should give him that power were we to make this rule absolute.

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against
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GRAVESEND.

Rule discharged.

The *Attorney-General*, *Scarlett* and *Comyn*, were to have opposed the rule.

**The KING, on the Prosecution of JAMES LAW,
against WILLIAM MEAD.**

THE defendant was indicted for perjury, and, at the *Middlesex* sittings after *Michaelmas* term, 1822, before *Abbott C. J.*, was found guilty. In *Hilary* term, 1823, a rule for a new trial was obtained by the *Attorney-General*, on the ground of the verdict having been against the weight of evidence and upon affidavits.

Defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and on shewing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose:

D. F. Jones and *Chitty* now shewed cause, and, amongst others, tendered affidavits, stating a dying declaration of *James Law*, the prosecutor, who was shot by the defendant after the conviction. The perjury assigned, and of which the defendant was convicted,

could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration.

consisted

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consisted in *Mead's* swearing, upon the trial of an information in the Exchequer, that *Law* had been present at and engaged in a smuggling transaction, at a place called the *Salt Pans*, in the parish of *Scalby*, in the county of *York*, on the 20th *August*, 1820, and upon the trial of which information *Law* was acquitted. The dying declaration of *Law*, after giving an account of the circumstances under which he was shot by *Mead*, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to by *Mead* in the Court of Exchequer.

The *Attorney-General*, *Clarke*, *Gurney*, and *Walton* objected to these affidavits of the dying declaration being received. Dying declarations are only admissible in criminal prosecutions, where the death of the deceased, and the circumstances of the death, are the subject of the charge against a prisoner, whereas here the statement, disclosed by the affidavits tendered, was not made with reference to the death of the dying man, but with reference to the antecedent charge of perjury. In *Doe dem. Sutton v. Ridgeway (a)*, it was held that the dying declarations of a person, as to the

power over his conscience as the sanction of any oath could have, and partly on the manifest absence of any interest, when he is on the point of passing into another world. Lord *Mohun's* case. (a) *Rex v. Reason*. (b) *Tinkler's* case. (c) 2 *Hume's Com. on the Law of Scotland respecting Crimes*, 391. The rule contended for on the other side, limiting evidence of this kind to cases of enquiry as to the cause or circumstances of death, is much too narrow, for in *Wright d. Clymer v. Littler* (d), evidence of a dying confession by the subscribing witness to a deed was held to be admissible. So also in the case before *Heath J.*, cited in *Avison v. Lord Kinnaird* (e), the confession of an attesting witness to a bond, who, in his dying moments, begged pardon of heaven for having been concerned in forging the bond, was received. Secondly, there was a connection in this case between the transaction to which the dying declaration referred, and the occasion of the death. The false accusation, to which the dying declaration referred, was the foundation of the personal hostility which led to the death. Thirdly, whether it would have been evidence on the trial or not, it may be received for the purpose of satisfying the Court upon the question of granting a new trial, in the same way as affidavits by parties themselves are received on similar occasions.

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ABBOTT C. J. We are all of opinion that the evidence cannot be received. In the case before Mr. Justice *Heath*, the declaration amounted to a confession

(a) 12 *St. Tr.* 949.(b) 1 *Str.* 499.(c) 1 *East, P. C.* 354.(d) 3 *Burr.* 1244.(e) 6 *East*, 195.

by

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by the party himself of a very heinous offence which he had committed. The same observation applies to the case of *Wright v. Littler*. Here, the dying declaration of *Law* was for the purpose not of accusing, but of clearing himself. It therefore falls, not within the exception on which those decisions proceeded, but within the general rule, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. (a)

The affidavits were rejected.

(a) The same point was ruled in *Rex v. Hutchinson*, tried before *Bayley J.* at the *Durham Spring Assizes*, 1822. The prisoner was indicted for administering *savin* to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned Judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of enquiry.

MARY THRESHER *against* The Company of Proprietors of the East LONDON Water Works.

Lessee, who
 has erected fix-
 tures for the
 purpose of
 trade upon the
 demised pre-

COVENANT on a lease. Breach, non-repair of premises. Plea, performance of the covenant. The cause was tried at the sittings at *Guildhall* after *Trinity* term, and afterwards takes a new lease to commence at the expiration of his former one which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to shew that they were not intended to pass under the general words of the second demise.

Quære, whether any circumstances dehors the deed can be alleged to shew that they were not intended to pass?

Quære, whether limekilns, erected for the purposes of trade, are removeable?

term,

term, 1823, when a verdict was found for the plaintiff, damages 500*l.*, subject to the opinion of the Court upon a case, stating in substance as follows. The lease upon which the action was brought, was a lease by indenture made by the plaintiff's ancestor to the defendants in the year 1791, reciting a former lease between the parties under whom the plaintiff and defendant claimed, made in the year 1756 for thirty-nine years; and which would not expire until 1795, and was in force at the time of making the lease in question. An under-lease of part of the premises was granted in 1783, by the lessees in the lease of 1756, to one *Joseph Matthews* for thirty-one years, and which, consequently, would not expire until 1814, several years after the expiration of the lease of 1756. The under-lease of 1783 was granted in consideration of a former underlease, which had become vested in *Joseph Matthews*, and there was a covenant to repair, and to leave at the end of the term the premises so repaired, together with all such erections and buildings as then were or should be at any time thereafter built or set up in, upon, or about the same, or any part thereof. In 1780, *Matthews* erected a limekiln on the premises, at the expence of 160*l.*, and *T. Ayres* and *Joseph Watford*, the assignees of the term granted to *Matthews*, erected a similar limekiln on the premises in 1790. It also appeared by the underlease of 1783, that a warehouse and stable were then standing on the premises thereby demised. Both these limekilns were therefore existing in 1791, when the lease in question was granted. The limekilns were built of brick and mortar, and the foundations let into the ground. They were erected for the purpose of carrying on the trade of a lime-burner. The chalk and coals used in the business were brought up the river

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against
The East
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Works Co.

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 ———
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Thames, and the lime sold on the premises to customers. By the lease of 1791, the demise was of a piece of ground formerly called the *Ozier Hope*, and the wharfs and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756; and the premises were said to be in the occupation of the several persons therein named, and among others, of *James Ayres, lime-burner*, habendum the said piece of ground, wharfs, and buildings thereon erected and built. The lessees covenanted to repair, uphold, and maintain this piece of ground, *erections, and buildings*, wharfs, cranes, and ponds, and the hedges, ditches, pales, and fences, belonging to the premises, and the said premises so repaired, upheld, and maintained, to *leave* and yield up at the end of the term. The action was brought for the removal of these limekilns. The lease of 1783 afterwards became vested in one *Meeson*, who, after the expiration of the term thereby granted, held the premises thereby demised for some time, as tenant from year to year, to the defendants, and pulled down the limekilns four years ago. The question in the cause was, whether the removal of those limekilns was a breach of the covenant to repair contained in the lease of 1791?

Amos for the plaintiff. The 'limekilns were demised by the indenture of 1791. Fixtures will pass by a conveyance of the freehold. *Colegrave v. Dias Santos*. (a) Until severed, they are a part of the freehold, and the lessee has only a continuing privilege in respect of them, *Lee v. Risdon*. (b) A new agreement for the enjoyment of the land puts an end to the right of the tenant to re-

(a) 2 B. & C. 76.

(b) 7 Taunt. 188.

move them, *Fitzherbert v. Shaw*. (a) Under a demise of lands, though some buildings are specifically named, yet all other buildings pass, *Com. Dig. Grant*, E. 3. It is true the demise is of the premises, *as the same were demised by the former lease*, and the limekilns were not in existence at the commencement of the former lease; yet buildings erected during a lease are considered in law as demised. *Lord Darcy v. Askwick* (b), *Fitz. N. B.* 55. The case of *Burton v. Brown* (c) is very similar to the present in that respect. The premises were potentially demised by the first lease, *Brown v. Blunden*. (d) Then if the limekilns were demised as part of the land, or under the name of erections and buildings by the indenture of 1791, it is clear, from the case of *Naylor v. Collinge* (e), that the lessee was bound to repair them, although they were erected for the purposes of trade. Secondly, these limekilns could never have been removable as fixtures. No case has determined that fixtures may be removed where destruction must precede their removal. Were the contrary determined, it would authorise the pulling down of extensive manufactories erected during a lease for the purpose of trade, which would manifestly defeat, instead of promoting the commercial interests of the country, out of regard to which the exception in favour of trade has been engrafted on the rule of the common law respecting fixtures. To make an instrument of trade capable of removal, it must have been in its own nature a chattel, before it has been set up, *Lawton v. Lawton*. (f) These limekilns have always been in a freehold state. The case of *Panton v. Ro-*

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against
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(a) 1 *H. B.* 258.(b) *Hobart*, 234.(c) 2 *Cro.* 648. *Palmer*, 319.(d) *Skinner*, 121.(e) 1 *Taunt.* 19.(f) 3 *Atk.* 13.

bart

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 ———
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bart (a) is distinguishable from the present, inasmuch as there the varnish-house, which was removed, had been brought from another place, where the defendant carried on his trade. In *Dean v. Allaley (b)*, the description of the premises does not appear, or what parts were taken away; and in *Poole's case (c)*, though pavement is mentioned in the pleadings, it cannot be collected from the judgment, that the court considered it removeable.

Campbell, for the defendant. The first lease, which was granted in 1756, did not expire until 1795. It was a continuing lease, therefore, in 1791, when the last lease was granted. The limekilns at that time had been erected; they might therefore have been removed at any time during the continuance of the term granted by the lease of 1756; and if so, they must continue to be removeable. It is stated that they were erected for the purposes of carrying on the trade of a lime-burner. The *Year-book*, 20 H. 7. fol. 13. pl. 24. *Poole's case*, *Elwes v. Maw (d)*, are authorities to shew that they may be removed during the term, and *Panton v. Robart* shews, that a tenant may remove the fixtures at any time

mise only that which belonged to him. The lessee is not estopped by the lease from saying that the limekilns were not the property of the lessor, because the buildings demised were the same as were demised by the lease of 1756, and at that time the limekilns were not erected.

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Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court; and, after stating the facts of the case, proceeded as follows.

The question in the cause is, whether the removal of the limekilns be a breach of the covenant to repair, contained in the lease of 1791.

On the behalf of the defendants three grounds of objection were taken.

First, that limekilns are not buildings within the meaning of a covenant to repair buildings; but this is answered by the case, in which it is found that they were erected with brick and mortar, and their foundations let into the ground.

Secondly, that, being erected for the purpose of trade, they were removeable generally.

Thirdly, that, upon the true construction of the several leases set forth in the case, they were removeable, or rather that they were not to be considered as having been demised by the lease of 1791.

By this lease of 1791 the demise is of a piece of ground formerly called the *Ozier Hope*, and the wharfs and *buildings* erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756, and the premises are said to be in the several occupations of persons therein named, and among others of James Ayres, *lime-burner*, Habendum the said piece

1824. of ground, wharfs, and buildings thereon erected and built. The lessees covenant to repair, uphold, and maintain the said piece of ground, *erections and buildings*, wharfs, cranes, and ponds, and the hedges, ditches, pales, and fences belonging to the premises; and the said premises so repaired, upheld, and maintained, to ~~leave~~ *leave* and yield up at the end of the term.

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Now it is settled, by the case of *Naylor v. Collinge* (a), that buildings erected for the purpose of trade, under a lease containing such a covenant, cannot be removed by the lessee, the terms of the covenant being general, and containing no exception. And this is highly reasonable, because the expectation of buildings to be erected during a term, and left at its expiration, is often one of the inducements to the granting of a lease, and forms a considerable ingredient in the estimate of the rent to be reserved. And if buildings for trade erected during a lease cannot be removed without the breach of such a covenant, neither can buildings erected before, and existing at the date of a lease, be removed without a breach of the covenant, unless there shall be some very special matter to take them out of the operation of the covenant. Whether

of which had been made into a wharf, for the landing, storing, and keeping goods, wherein are two docks, and the wharf is fenced off by pales, and part of which was formerly an ozier ground, but then converted into three ponds or reservoirs. It does not appear by the case whether any covenant to repair was contained in this lease, and the instrument is probably lost, and its contents known only by the recital of it in the lease of 1791, in which it further appears, that the lessees had applied for a further term of thirty-one years, which is granted at a considerable increase of rent. There is, therefore, nothing in this lease of 1756 that can restrain or qualify the covenant to repair in the lease of 1791; and it has not been shewn by what reason or rule of law the lessees of 1791, having accepted a lease (by indenture) of ground and buildings thereon, could be allowed to say that the ground only, and not the buildings thereon, should be deemed to pass by that lease. It would be very difficult to maintain such a proposition, by the circumstance of the buildings having been erected by their under-lessee during the continuance of the first lease, even if such under-lessee, as between him and his own immediate lessor, had a right to remove the buildings; for the original lessor might very reasonably say, that he had nothing to do with any contract between other parties. But, upon adverting to the under-lease of 1783, the foundation of such an argument is wholly removed, because, by the terms of that underlease, the under-lessee, *Matthews*, has covenanted, not only to repair and uphold the premises demised to him, but also to leave, at the end of the term, those premises so repaired and upheld, *together with all such erections and buildings as then were or should be at any time thereafter built or set up, in, upon, or about the same, or any part*

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thereof. So that, according to the case of *Naylor v. Collinge*, the under-lessee himself could not have removed those limekilns without a breach of his covenant made with his own lessors.

For these reasons our judgment is in favour of the plaintiff; and the *postea* is to be delivered to her.

Judgment for the plaintiff.

LAMBERT *against* BUCKMASTER.

Wednesday,
February 11th.

An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill.

JOHN BUCKMASTER and *William Buckmaster*, copartners in trade, were declared bankrupts November 16th, 1822. Before the commission issued *J. Buckmaster* was indebted on his separate account to his solicitor *Watson*. The two partners were also indebted upon their joint account to *Watson*. Subsequently to the issuing of the commission, *Watson* having in his possession two leases belonging to *John Buckmaster's* separate estate, and believing that if he sued the bankrupt and obtained judgment, the sheriff might sell the leases under the execution, brought two actions, one

were paid. A rule had been obtained, calling upon him to deliver up the deeds and papers upon payment of the amount of his bills only.

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against
BUCKMASTER.

Hutchinson shewed cause. It is quite clear, that if the action was brought with the knowledge of the assignees that they must be liable for the costs, and it appears, that the solicitor to the assignees was informed, that unless the bills were paid, an action would be commenced. The assignees have no better claim than the bankrupt himself would have had if there had not been any bankruptcy. Now, he could not have had any right to his papers without paying the costs of the actions on the bills. If the assignees in this case had offered to pay the bills of costs when they ought to have done it, there would have been no ground for this application.

Comyn, contra. The assignees are not liable for any debt incurred by the bankrupt subsequently to the issuing of the commission. Now the costs of the two actions were a debt incurred after the commission had issued. The right of acquiring the lien as against the bankrupt ended at the time when the commission issued. [*Bayley J.* Suppose a mortgagor to have become bankrupt, and the mortgagee to have brought an ejectment to recover possession of the premises, could the assignees of the bankrupt redeem without paying the costs of the ejectment.] The mortgagee has the legal title, but the person claiming a lien has only an equitable title.

ABBOTT C. J. I think the solicitor had the same right of lien against the assignees that he had against the
S s 3 bankrupts.

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Lawrence
against
Buckmaster.

bankrupts. Now it is quite clear, that as against them his lien would have extended to the costs of the two actions, and I think that he has a lien to that extent in this case against the assignees, unless it could be shewn that he, as an attorney of this court, had improperly commenced the action. If, indeed, the debt had been tendered before the action was brought, that might have formed an answer to this claim for the costs of the actions, inasmuch as it would have been a defence to the action itself.

Rule absolute upon payment of the debt
and costs in the actions, and costs of
the application.

Thursday,
February 12th.

The KING *against* COOKE.

The Court will
not, upon
motion, quash
a bad plea in
abatement.

TO an indictment for a conspiracy the defendant pleaded the following plea. " And *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, who is indicted by the name of *Richard Stafford Cooke*, late of



the ground that it was clearly bad, and pleaded for the purpose of delay.

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against
Cocks.

Campbell now shewed cause. The objection to the plea is, that the patent and pedigree is not set out. That may be cause for demurrer, but is no ground for quashing the plea. The defendant would thereby be deprived of the opportunity of discussing the validity of his plea upon a writ of error. In *Thomas v. Smithies* (a) the court refused to quash a plea in abatement, on the ground that it was insensible.

Scarlett and *Talfourd*, contra. In criminal proceedings it is discretionary in the Court either to quash a plea on motion or to leave the prosecutor to demur. That rule is laid down as to indictments in *Comyn's Digest*, tit. *Indictment*, letter H. [*Abbott* C. J. There is a great difference between indictments and pleas in this respect. Have you any instance in which the Court have quashed such a plea?] In *Rex v. Grainger* (b), the Court set aside a dilatory plea because it was not verified by affidavit.

Per Curiam. Then it was no plea at all, the statute of *Anne* requiring that such a plea should be verified by affidavit before it is received. It would be much too strong a measure to quash the plea in this case.

Rule discharged. (c)

(a) 4 *Taunt.* 668.

(b) 3 *Burr.* 1817.

(c) Upon the question, whether the plea was bad, the following authorities were cited: 2 *Hale's P. C.* 240. *Co. Litt.* 16 b. and note 3. *Countess of Rutland's case*, 6 *Coke*, 53. *Rex v. Knowles*, 1 *Ld. Raym.* 10.

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*Thursday,
February 12th.***LEWIS against HARRIS.**

A rule for setting aside an inquisition before the sheriff for excessive damages. The matter was referred, nothing being said about the costs of the application. The arbitrator by his award having reduced the damages, it was held, that the plaintiff was not entitled to the costs of the application.

WRIT of enquiry before sheriff. Rule obtained by defendant to set aside the inquisition for excessive damages. The amount was referred. Nothing was said about costs. The arbitrator reduced the damages by 50*l*. The Master, on taxation of costs, refused to allow the plaintiff the costs of the rule to set aside the inquisition. A rule nisi having been obtained for directing the Master to review his taxation,

Maule shewed cause, and contended, that as nothing was said about the costs at the time when the amount of damages was referred, each party ought to bear his own costs of the rule to set aside the inquisition,

Campbell, contra, contended, that they must be considered as costs in the cause, and that the plaintiff being entitled to costs generally, was entitled to those in dispute.

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JOHNSON *against* STANTON.Thursday,
February 12th.

THIS was an action for an assault and battery tried before *Hullock* B., at the last assizes for *Shrewsbury*, and the jury found a verdict for the plaintiff, damages one farthing. Four days after the trial, but before the Judge had left the assize town, the Judge, in order to give the plaintiff his costs, certified that an actual battery had been proved; and the Master allowed the plaintiff his full costs upon taxation. A rule nisi had been obtained by *W. E. Taunton* for the Master to review his taxation, on the ground that in order to entitle the plaintiff to costs, the Judge should have certified at the trial. The words of the 22 & 23 *Car. 2. c. 9.*, being “in all actions of assault and battery, wherein the Judge at the trial of the cause shall not certify, &c.” the plaintiff shall not recover more costs than damages. Here the certificate was granted four days after, and not at the trial.

A judge's certificate, under stat. 22 & 23 *Car. 2. c. 9.*, may be granted within a reasonable time after the trial.

Campbell shewed cause, and contended, that upon this statute the certificate might be granted at any time after the trial, and before final judgment.

Taunton, contra, argued that the words of the statute were imperative, that the Judge should certify *at* the trial, and cited *Ford v. Parr* (a), which, though a case on the stat. 8 & 9 *W. 3. c. 11.* was in principle applicable to the construction of 22 & 23 *Car. 2. c. 9.*

(a) 2 *Wils.* 21.*Per*

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Per Curiam. The words, "the Judge at the trial of the cause," mean the Judge who tried the cause; they cannot be expounded literally, because the certificate cannot be granted at the trial, but only after the trial when the jury have found their verdict. And this construction is the convenient one, as it conduces to the better administration of justice, that the Judge should have time to consider of the certificate rather than to be under the necessity of deciding upon it at the instant.

Rule discharged

Thursday,
February 12th.

DOE, on the Demise of REES, against THOMAS.

Seemle, that the Court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud

IN this case an ejectment had been tried at the court of great sessions in the county of *Glamorgan, Wales*, and a verdict found for the defendant. A new ejectment having been brought in this Court, a rule nisi had been obtained by the defendant to stay the proceedings until the costs of the former ejectment were paid,

obtained by fraud. That would have been the proper subject of a motion for a new trial.

1824.

~~Ex dem.~~
Dox dem.
against
THOMAS.

Russell suggested that by the practice of the court of great sessions in *Wales*, the party was bound to move for a new trial within a very short time, and it appeared by the affidavits that that time had elapsed before it had been discovered that the verdict had been obtained by fraud and perjury.

Per Curiam. The rule to stay proceedings until the costs of a former ejectment are paid, is not inflexible; and if the fact was clearly made out that the verdict had been obtained by the means stated in the affidavits, the rule ought never to have been granted. The whole matter was referred to the Master, to decide whether the lessor of the plaintiff should be at liberty to proceed to trial without paying the costs of the former ejectment, and upon his report the rule was afterwards made absolute.

1824.

*Thursday,
February 12th.***GAINSFORD against CARROLL and Others.**

In assumpsit for not delivering goods upon a given day, the true measure of damages is the difference between the contract price and that which goods of a similar quality and description bore, on or about the day when the goods ought to have been delivered.

ASSUMPSIT for the non-performance of three contracts entered into by the defendants with the plaintiff for the sale of fifty bales of bacon, to be shipped by them from *Waterford*, in the months of *January*, *February*, and *March* 1823 respectively. The defendant suffered judgment by default, and, upon the execution of the writ of enquiry in *London*, the secondary told the jury that they were at liberty to calculate the damages according to the price of bacon on the day when the enquiry was executed, and that the difference between that and the contract price ought to be the measure of damages. *Parke* had obtained a rule nisi for setting aside the enquiry on the ground that the plaintiff was only entitled to recover the difference between the contract price and the price which the article bore at or about the time when, by the terms of the contract, it ought to have been delivered. He cited *Leigh v. Paterson* (a), in which the court of C. P. intimated an opinion that the damages should be calculated according to the price of the day on which the contract ought to have been performed. This is different from the case of a loan of stock; there the lender, by the transfer deprives himself of the means of replacing the stock, he has not the money to go to market with, but in the case of a purchase of goods, the vendee is in possession of his money, and he has it in his power, as soon as the

(a) 8 Taunt. 540.

vendor

vendor has failed in the performance of the contract, to purchase other goods of the like quality and description, and it is his own fault if he does not do so.

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Wilde contra contended that the rule which had been laid down, as to the measure of damages, for not replacing stock, applied to the present, and he cited *Stevens v. Johnson*, (a) and *M'Arthur v. Lord Seaforth*. (b)

Per Curiam. Those cases do not apply to the present. In the case of a loan of stock the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here the plaintiff had his money in his possession and he might have purchased other bacon of the like quality the very day after the contract was broken, and if he has sustained any loss, by neglecting to do so, it is his own fault. we think that the under sheriff ought to have told the jury that the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered.

Rule Absolute.

(a) 2 *East*, 211.(b) 2 *Taunt.* 257.

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Thursday,
February 12th.

COULSON, Assignee of the Sheriff of MIDDLESEX,
against HAMMON.

In an action by original, if the defendant does not appear the bail-bond is forfeited on the quarto die post, the other four days being allowed merely *ex gratia*; and therefore, where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days, it was held that the penalty of the bond was a debt proveable under the commission, and therefore barred by the certificate.

IN *February*, 1823, a testatum *capias* issued against one *Joseph Brown*, at the suit of the plaintiff, returnable in fifteen days of *Easter*, (13th *April*,) the 16th being the quarto die post; and the four days after the quarto die post expiring on the 20th. *Brown* was arrested, and the defendant became one of the bail to the sheriff, and executed a bail-bond for the appearance of *Brown* at the return of the writ. On the 19th *April* a commission of bankrupt issued against *Hammon*, and he was duly declared a bankrupt, and has since obtained his certificate. On the 24th of *April* the sheriff executed an assignment of the bail-bond to *Coulson*, and he commenced this action on the bail-bond against the defendant, and signed judgment for want of a plea, and the defendant having been taken in execution on a *capias ad satisfaciendum* founded on this judgment, a rule nisi had been obtained for discharging him out of custody, on the ground that the cause of action had occurred before the date of the commission, the bail-bond being then forfeited, and that the debt was therefore proveable under the commission, and barred by the certificate.

R. V. Richards shewed cause. The bond was not forfeited on the 19th *April*, when the commission issued; for the defendant in the original action had four days after the quarto die post to put in bail. *Frampton v. Barber.* (a)

(a) 4 T. R. 377.

But

But the Court were clearly of opinion that the bail-bond was forfeited on the quarto die post, and said that the other four days were allowed merely ex gratiá.

Rule absolute.

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COULSON
against
HAMMON.

G. J. KAIN *against* OLD and Others, Executors
of W. DODDS.

THIS was an action of assumpsit, in which the now plaintiff, *George Joseph Kain*, declared that in the lifetime of the said *William Dodds*, in consideration that *Kain* would buy from *Dodds* a certain vessel, to wit, the *Snow Fortitude*, at the price of 1650*l.*, to be therefore paid by *Kain* to *W. Dodds*, he (*Dodds*) had undertaken and faithfully promised *Kain* that the said vessel was then copper bolted; *Kain* averred, first, that he, confiding in the promise of *Dodds*, had afterwards bought the said vessel of *Dodds*, and had paid to *Dodds* the price thereof; and the said *G. J. Kain* further confiding as aforesaid, afterwards, and after the death of the said *W. Dodds*, sold the said vessel to one *James Shepherd*, and upon such sale he, *G. J. Kain*, had warranted the vessel to be copper fastened. And the said *G. J. Kain* further said, that at the time of the making of the promise of *W. Dodds* in that behalf, and at the time of the said sale, the said vessel was not copper bolted, by means whereof the said vessel had become and was of little value to *G. J. Kain*; and by reason thereof *J. Shepherd* had impleaded *Kain*

Defendants' testator being sole owner of a ship, signed and delivered to the plaintiff, *G. J. K.*, an instrument, describing the ship as copper bolted, (but not reciting the certificate of registry); at the foot of which was written, "Sold the within-mentioned ship to *G. J. K.*" He afterwards executed a bill of sale to the plaintiff in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, and plaintiff declared in assumpsit against the defendants (as executors of the vendor,) for the breach maintained, the

of his warranty in that particular: Held, that the action could not be maintained, the instrument first mentioned being void by the 34 G. 3, c. 68, s. 14.

in

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in a certain action on the case for damages sustained by *Shepherd* on occasion of the breach of the said warranty, and that such proceedings had been thereupon had in the said action, that *Kain* had been forced and compelled to pay, and had necessarily paid a large sum of money, to wit, 1000*l.*, in satisfaction of the damages and costs recovered against him by the said *J. Shepherd* in that action, and in payment of the costs necessarily incurred by *G. J. Kain* in and about his defence to the said action, and concluded to the damage of the said *G. J. Kain* of 2000*l.* At the trial before *Abbott C. J.* at the *London* sittings after *Trinity* term, 1822, a verdict was found for the plaintiff, damages 783*l.* 5*s.* 6*d.*, subject to the opinion of the court upon the following case: On the 25th *October*, 1816, the testator being sole owner of a ship called the *Fortitude*, signed and delivered to the said *G. J. Kain* an instrument, of which the following is a copy: "For sale or charter, one boom main sail, one lower steering sail, one middle stay sail, and one top gallant stay sail. The *Snow Fortitude*, A 1, *British* built, copper bolted, and new coppered in 1813, admeasures per register 277 tons, is well calculated for

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herd, according to printed particulars, substantially the same as those already set out. At the foot of those particulars, *G. J. Kain* wrote "I agree to sell Mr. *Shepherd* the *Fortitude*, with all her stores, as per inventory, for the sum of 2300*l.* *G. J. Kain.*" The *Fortitude* was conveyed by *G. J. Kain* to *J. Shepherd* by bill of sale, in the same form as that by which she had been conveyed by testator to *G. J. Kain*. In *Hilary* term, 1821, *J. Shepherd* commenced an action upon the case against *G. J. Kain* in the Court of King's Bench in respect of the said last-mentioned sale, and declared upon a warranty that the vessel was copper fastened, and there was a count for a deceitful representation that she was copper fastened. Upon the trial of that action, the jury found a verdict for *Shepherd*, damages 500*l.*, which, together with 142*l.* 10*s.* taxed costs, were paid by *Kain* to *Shepherd* before the commencement of this action. *Kain's* own costs in that action amounted to 140*l.* 15*s.* 6*d.*, and make together with the former sums the aggregate sum of 783*l.* 5*s.* 6*d.* *Kain* gave no notice of the action of *Shepherd v. Kain* to *Dodds* or his executors. At the time of the sale of the ship by *W. Dodds* to *Kain*, the ship was not copper bolted. The case was argued at the sittings in banc after last *Hilary* term, and again in *Trinity* term by

Manning, for the plaintiff. The objection on the part of the defendant rests on two cases, *Biddell v. Leader* (a) and *Pickering v. Dowson* (b); but they are both distinguishable from the present. The former turned upon the register act, 34 G. 3. c. 68. s. 14.; but

(a) 1 B. & C. 327;

(b) 4 Taunt. 779.

ation is evidence of a warranty by the vendor that the ship was copper fastened. The bill of sale in this case was not the agreement between the parties, but the completion of the agreement; the language was of one party only, and the covenants were merely such as the law would imply if not expressed. *Hodges v. Drakeford* (a), *Baker v. Paine*. (b) Under such circumstances other evidence of the agreement between parties may be admitted, *Jeffery v. Walton*. (c)

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Campbell, contra. This was an action of contract, and it was necessary to prove the consideration and promise laid in the declaration. The agreement in question was offered as proof of the promise, but that agreement is made void by the 34 G. 3. c. 68. s. 14. It is immaterial whether it be a transfer or an agreement for a transfer, for it contains no such recital as required by that statute. This was decided by *Brewster v. Clarke* (d) and *Biddell v. Leader*, which are not to be distinguished from the present case. It cannot then operate as a contract. But it is said, that it may nevertheless operate as a representation, and therefore be evidence of a contract. But the statute says that such an instrument shall not be valid for any purpose, how then can it prove a contract? But admitting it to be a representation, still, not being introduced into the subsequent contract, it is not binding. Where the whole contract is by parol, all that passes may possibly be taken as part of it; but it is otherwise where the contract is reduced into writing. *Countess of Rutland's case* (e), *Meyer v.*

(a) 1 N. R. 270.

(b) 1 Ves. sen. 456.

(c) 1 Stark. 267.

(d) 2 Mer. 75.

(e) 5 Co. 26.

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Everth (a), Gardiner v. Gray (b), Powell v. Edmunds (c), Hope v. Atkins (d), Pickering v. Dawson, Lano v. Neale. (e)
If the representation were fraudulent it might perhaps have been the ground of an action *ex delicto* against the vendor, but cannot be considered as a part of the contract, so as to sustain this action of assumpsit against his representatives.

Manning, in reply. The *Countess of Rutland's* case and the other cases cited, are applicable to parol evidence only, here the representation was reduced into writing, and is not therefore liable to the objection, that it is dangerous to admit evidence depending upon memory alone, to vary a contract which has been reduced into writing.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court.

This is an action of assumpsit, brought for the recovery of damages for the breach of an alleged contract. The declaration alleges that, in consideration that the plaintiff would buy of the defendant's testator a certain ship at a price mentioned, the testator promised

of the ship, signed and delivered to the plaintiff an instrument describing the ship as copper bolted, and containing an inventory of stores; at the foot of which was written, "Sold the within mentioned ship to Messrs. *Kain* and Son, *W. Dodds*." And it was further found that the testator received the sum of 1650*l.*, and executed a bill of sale of the ship to *Kain*. That bill of sale was in the usual form, and contained a recital of the certificate of registry, but it did not describe the vessel as copper bolted. It was further found that *Kain* re-sold the ship to *Shepherd*, according to printed particulars similar to those before mentioned, and executed to him a bill of sale similar to that which was executed by the testator; that *Shepherd* brought an action on the case against him on his warranty, that the ship was copper fastened, and recovered.

Upon this case the question is, whether the plaintiff has proved a promise according to his declaration. We think he has not. The first instrument, which contains a description of the ship as copper bolted, and an inventory of her furniture, and concludes with the words, "Sold the within mentioned ship to Messrs. *Kain* and Son, *W. Dodds*" cannot in our opinion be regarded as an instrument of contract. It is invalid either as a conveyance or as an agreement to convey the ship, by the register acts, because it does not contain a recital of the certificate of registry, *Biddell v. Leader*.^(a) And it is imperfect as an instrument of contract, because it does not mention the price, and this defect is not supplied by any fact appearing in the case; for there is no mention of any price as agreed between

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the parties before or at the time when *Dodds* the testator delivered the paper to the plaintiff: and the bill of sale mentions the sum of 1650*l.* as the consideration of the sale, but does not mention any prior contract or agreement. We do not, however, rely on this imperfection, the objection arising out of the register act being decisive as to the invalidity of the paper. The bill of sale then is the only instrument of contract, and this does not describe the ship as copper bolted; though it contains covenants for the title and for further assurance. The description of copper bolted in the paper can therefore be considered as a representation only, and not as any part of the contract. The contract is in writing, as every contract for the sale of a ship must be.

Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract. A matter antecedent to and dehors the writing, may in some cases be received in evidence, as shewing the inducement to the contract; such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to shew such a representation, unless he can also shew that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist. All this is very clearly laid down in the judgment delivered by the late Lord Chief Justice *Gibbs* in *Pickering v. Dowson*, and it is decisive of the present case wherein the plaintiff has neither de-
clared

clared upon, nor proved fraud on the part of the defendant's testator, but has declared upon a promise or contract. The *postea*, therefore, is to be delivered to the defendant.

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Judgment for the defendant.

Fox against The Bishop of CHESTER, in Error.

QUARE impedit. The declaration stated that the Bishop of *Chester* was attached, to answer *E. V. Fox* in a plea, that he permit the said *E. V.* to present a fit person to the church of *Wilmslow*, in the county of *Chester*. The first count stated that the advowson of the rectory of the church of *Wilmslow* was appurtenant to the manor of *Bollyn*, and set out specially the title of *Thomas Joseph Trafford* to the manor, with the appurtenances for life, and shewed, that *J. Bradshaw*, the last incumbent, was presented by virtue of a grant of the next avoidance made by *T. Trafford*, through whom *T. J. Trafford* claimed; and then proceeded, "And the said *T. J. Trafford* being so seised thereof, afterwards, to wit, on the 12th day of *November*, 1819, at, &c. (the said church being then and there full of the said *J. Bradshaw*, the then incumbent thereof) by a certain indenture then and there made between *T. J. Trafford* of the one part and plaintiff of the other part (which plaintiff brings into court sealed, &c.), he the said *T. J. Trafford*, for the consideration therein mentioned, did grant, bargain, sell, and demise unto plaintiff, his executors, &c., all that the said advowson, donation, right of patronage, presentation, and free disposition of,

Where a contract was made for the sale of a next presentation, the parties at the time knowing the incumbent to be at the point of death and expecting an immediate vacancy: Held, that the contract was simoniacal, and the presentation made in pursuance of it by the purchaser, void, although the clerk presented was not privy to the transaction, and the contract was not entered into with a view to the presentation of any particular person.

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in, and to the said rectory and parish church of *Wilmslow*, in the county palatine of *Chester*, with the rights, members, and appurtenances thereunto belonging, habendum to the said plaintiff, his executors, &c., for ninety-nine years, if the said *T. J. Trafford* should so long live. By virtue of which said last-mentioned indenture the said plaintiff then and there became and was possessed of the said advowson of and in the said rectory, as in gross by itself for the said term, so to him thereof granted. Averment, that *T. J. Trafford* is still living, and that after the making of the indenture, and whilst plaintiff was possessed of the advowson, to wit, on, &c., the said church became vacant by the death of the said *J. Bradshaw*, the last incumbent thereof, whereby it then belonged and now belongs to the plaintiff, to present a fit person to the said church so being vacant; but the said bishop unjustly hinders him from so doing. There was a second count setting out a title to the advowson in gross, and omitting all mention of the manor; in all other respects it was similar to the first. The defendant craved oyer of the indenture made between plaintiff and *Trafford*, whereby it was witnessed, that, in consideration of 6000*l.* paid to *Trafford* by the plaintiff, the former had granted, bargained, sold, and demised, and by the said indenture did grant, &c. all that the advowson, donation, right of patronage, presentation, and free disposition of, in, and to the rectory and parish church of *Wilmslow*, with the rights, members, and appurtenances thereunto belonging, habendum for ninety-nine years, if *Trafford* should so long live. And *Trafford* covenanted that he had good right to grant and demise the advowson, &c., and that he would indemnify plaintiff against all manner of right, title, claim, and

and demand whatsoever, which the chancellor and scholars of the University of *Cambridge* might have or claim in the said advowson, &c., during the said term of ninety-nine years, and against all right, claim, &c. which any person thereafter presented or nominated to the said parish church of *Wilmslow* by the said chancellor and scholars might have or claim thereto by virtue or colour of such presentation or nomination, and against all costs and expences which plaintiff might be put to by reason of any such title or claim. There was then a covenant for further assurance, followed by this proviso: “provided always, and it is hereby declared and agreed, by and between the said parties hereto, that when and so soon as he the said *E. V. Fox*, his executors, &c., shall have presented to the said rectory or church of *Wimslow*, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion, or cession of *J. Bradshaw*, the present incumbent, or otherwise, or through the wilful neglect or default of him the said *E. V. Fox*, his executors, &c. the said rectory or church shall have been suffered, as to the presentation or right of presentation thereto, to lapse, he the said *E. V. Fox*, his executors, &c., shall and will, at any time or times thereafter, at the request and proper costs and charges of the said *T. J. Trafford*, or such person as he shall appoint, re-assign the said advowson to him the said *T. J. Trafford*, or such person as afore-said, for all the residue which shall be then unexpired of the said term of ninety-nine years, free from all incumbrances, by the said *E. V. Fox*, his executors, &c.” He then craved oyer of the indenture in the second count mentioned, which was declared to be in the same words as the indenture in the first count, and therefore not

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set out on the record. He then pleaded *actio non*, because the said *T. J. Trafford* did not grant, bargain, sell, and demise unto the said plaintiff, his executors, &c. the said advowson, &c., in the first count of the declaration mentioned, in manner and form as plaintiff hath in that count alleged and concluded to the country: to which the similiter was added by plaintiff. Similar plea to the second count. The third plea, which was pleaded to both counts, averred the identity of the indenture set out in the first count with that set out in the last count, and then proceeded: "And the said bishop further saith, that the said indenture was made after the said church became vacant, as in the declaration mentioned, by the death of the said *J. Bradshaw*, the said incumbent thereof, and that *Trafford*, after the church became vacant, by the indenture granted, bargained, sold, and demised, unto the plaintiff, his executors, &c., the said advowson, &c., of, in, and to the said rectory and parish church of *Wilmslow*; without this, that *Trafford*, whilst the said church was full of the said *J. Bradshaw*, the incumbent thereof, did grant, &c. unto the plaintiff, his executors, &c., the said advowson, &c., of, in, and to

said *T. J. Trafford* was so seised of the said manor, to which, &c., with the appurtenances, and of the said advowson, as in the said declaration mentioned, and before the making of the corrupt simoniacal and unlawful agreement in this plea after mentioned, to wit, on the 11th day of *November*, in the year of our Lord, 1819, the said *J. Bradshaw* then being the incumbent of, and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, to wit, at, &c., whereof, as well the said *E. V. Fox* and *T. J. Trafford* as one *George Uppleby*, clerk, in this plea after mentioned, to wit, on, &c., and also at the time of making the corrupt, simoniacal, and unlawful agreement, in this plea after mentioned, there had notice. And the said bishop further says, that whilst the said *T. J. Trafford* was so seised of the said manor, to which, &c. with the appurtenances, and of the said advowson as aforesaid, and whilst the said *J. Bradshaw*, so being the incumbent of and filling the said church as aforesaid, was so afflicted and in such danger, state, and condition as aforesaid, to wit, on, &c., at, &c., they the said *T. J. Trafford*, *E. V. Fox*, and *George Uppleby*, and each of them, then and there, well knowing the premises, and believing and expecting that the death of the said *J. Bradshaw* of the mortal disease aforesaid was then and there fast approaching, and that by means of the death of the said *J. Bradshaw* the said church would forthwith become vacant, it was in such belief and expectation corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said *T. J. Trafford* and the said *E. V. Fox*, with the knowledge of the said *G. Uppleby*, that the said *E. V. Fox* should pay
to

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to the said *T. J. Trafford* a sum of money, to wit, the sum of 6000*l.*, and that the said *T. J. Trafford*, in consideration thereof, should grant, bargain, and sell to the said *E. V. Fox* the next presentation to the said church; and that, in order to make such grant, bargain, and sale, and as a means of making such grant, bargain, and sale to the said *E. V. Fox* of the next presentation to the said church, and as a shift, contrivance, and device to evade and elude the making such grant, bargain, and sale as a mere grant, bargain, and sale to the said *E. V. Fox* of the next presentation to the said church in express terms, the said indenture, in the said declaration mentioned to have been made between the said *T. J. Trafford* and the said *E. V. Fox*, should be made, and that the said *T. J. Trafford* should seal, and as his act and deed deliver the said indenture. And the said bishop further says, that afterwards, and whilst the said *T. J. Trafford* was so seised of the said manor, to which, &c., with the appurtenances, and of the said advowson, and whilst the said *J. Bradshaw*, so being the incumbent of and filling the said church as aforesaid was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord 1812, to wit, at

the said indenture in the said declaration mentioned to have been made between the said *T. J. Trafford* and the said *E. V. Fox* was made, and the said *T. J. Trafford* did then and there seal, and as his act and deed deliver the said indenture. And the said bishop further says, that the said *J. Bradshaw* so being the incumbent of and filling the said church as aforesaid, remained and continued so afflicted as aforesaid, and in such danger, state, and condition as aforesaid, from the time in that respect in this plea abovementioned, until the time of his death, and that afterwards, to wit, on the 12th day of *November*, 1819, *Bradshaw*, so being the incumbent of and filling the said church as aforesaid, of the disease aforesaid died, to wit, at, &c. and by means thereof the said church then and there became and was vacant: and the said bishop further says, that by reason of the premises and by force of the statute in such case made and provided, the said last-mentioned indenture became, and was, and is utterly void, frustrate, and of no effect in law, and wholly inoperative to grant, pass, or convey any estate, right, title, or interest in the said advowson, or any presentation, or any right of presentation to the said church to the said *E. V. Fox*. And the said bishop further says, that afterwards, to wit, on the 30th day of *December*, 1819, at, &c. the said *E. V. Fox*, under colour, and by pretence and means of the said last-mentioned indenture, so made as aforesaid, in pursuance of the said corrupt, simoniacal, and unlawful agreement, did corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, present the said *G. Uppleby*, clerk to the said bishop, to be admitted, instituted, and inducted into the said

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said church of *Wilmslow*, to wit, at, &c. But the said bishop further says, that by reason of the premises, and by force of the statute in such case made and provided, the said presentation of the said *G. Uppleby*, by the said *E. V. Fox*, so made as aforesaid, became, and was, and is utterly void, frustrate, and of no effect in law, and the said bishop, by reason thereof, did not, nor could admit, institute or induct, nor by law ought to have admitted, instituted, or inducted, nor yet by law ought to admit, institute, or induct the said *G. Uppleby* into the said church upon or by virtue of that presentation, which is the same hindrance and disturbance, &c. whereof the said *E. V. Fox* hath above complained. The fifth plea was like the fourth, omitting the parts in italics. The sixth plea varied from the fourth only by omitting to state that *Uppleby* had notice of the several matters as well as plaintiff and *Trafford*. The seventh plea varied from the fifth in the same manner. The eighth plea alleged that the said church of *Wilmslow* is within defendant's diocese of *Chester*, and a benefice with cure of souls, and that whilst the said *T. J. Trafford* was so seised of the said manor, to which, &c. with the appurtenances, and of the said advowson, as in the said declaration mentioned, and before the making of the corrupt, simoniacal, and unlawful agreement in this plea after mentioned, to wit, on the 11th day of *November*, 1819, the said *J. Bradshaw*, then being the incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, to wit, at, &c. whereof the said *E. V. Fox* and *T. J. Trafford*, to wit, on, &c., and also at the time of making the corrupt, simoniacal,
 and

and unlawful agreement in this plea after mentioned, there had notice. And the said bishop further says, that whilst the said *T. J. Trafford* was so seised of the said manor, to which, &c., with the appurtenances and of the said advowson as aforesaid, and whilst the said *J. Bradshaw*, so being the incumbent, and filling the said church as aforesaid, was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on, &c. at, &c. they the said *T. J. Trafford* and *E. V. Fox*, and each of them, then and there well knowing the premises, and believing and expecting that the death of the said *J. Bradshaw*, of the mortal disease aforesaid, was then and there fast approaching; and that by means of the death of the said *J. Bradshaw* the said church would forthwith become vacant; it was in such belief and expectation corruptly, simoniacally, and unlawfully, and against the force of the statute in such case made and provided, agreed by and between the said *T. J. Trafford* and the said *E. V. Fox*, that, in consideration of a large sum of money, to wit, the sum of 6000*l.* to be therefore paid by the said *E. V. Fox* to the said *T. J. Trafford*, the said indenture in the said first count of the said declaration mentioned to have been made between the said *T. J. Trafford* and the said *E. V. Fox*, should be made; and that the said *T. J. Trafford* should seal, and as his act and deed deliver the said indenture. And the said bishop further says, that afterwards, and whilst the said *T. J. Trafford* was so seised of the said manor, to which, &c., with the appurtenances, and of the said advowson, and whilst the said *J. Bradshaw* so being incumbent of and filling the said church as aforesaid, was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on the 12th day of
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1824. *November*, in the year of our Lord 1819, at, &c. in pursuance, furtherance, and performance of the said corrupt, simoniacal, and unlawful agreement, the said indenture in the said first count of the said declaration mentioned to have been made between the said *T. J. Trafford* and the said *E. V. Fox* was made; and the said *T. J. Trafford* did seal, and as his act and deed deliver the said indenture. The ninth plea, after stating the illness of the incumbent, and that plaintiff and *Trafford* had notice of it, alleged the corrupt and simoniacal agreement to have been, that *Trafford* should, "in consideration of money, grant, bargain, and sell to the plaintiff the next presentation to the said church," and averred that the indenture in the declaration mentioned was made in pursuance of that agreement, and concluded as the eighth plea. The tenth plea, after the same introduction, alleged, that plaintiff and *Trafford* well knowing the premises, and believing and expecting that the death of the said *J. Bradshaw*, of the mortal disease aforesaid, was fast approaching, and that by means of his death the said church would forthwith become vacant; and the said plaintiff intending to present the said *G. Uppleby* to be admitted, instituted, and

sale of the next presentation the indenture in the declaration mentioned was executed by *Trafford*, and that the plaintiff accepted and received it with intent to present *Uppleby*, and concluded as the former pleas. The 11th plea, after the same introductory matter as in the ninth, alleged, that it was corruptly, &c. agreed between the plaintiff and *Trafford*, "that the indenture mentioned in the declaration, should be made, and that it was made in pursuance of that agreement." The 12th plea varied from the eleventh only by omitting to allege that plaintiff and *Trafford* knew of the incumbent's dangerous illness. The thirteenth plea, after the averment of identity, without mentioning *Bradshaw*, alleged, that whilst *Trafford* was seized of the manor and advowson, it was corruptly, &c. agreed between him and the plaintiff that the indenture in the declaration mentioned should be made, and that it was made and executed in pursuance of that agreement. The 14th plea, after the same introduction, stated that whilst *Trafford* was seised of the manor and advowson, and before the making of the said simoniacal and corrupt agreement in this plea after mentioned, to wit, on, &c. and after the death of the said *Bradshaw*, the said last incumbent of the said church; and after the church became vacant by the death of *Bradshaw*, and whilst it remained and was vacant, to wit, on, &c. it was corruptly, &c. agreed by and between *Trafford* and the plaintiff that *Trafford* should, in consideration of 6000*l.* to be paid by the plaintiff to him, grant, bargain, and sell to the plaintiff the next presentation to the said church, and that the indenture beforementioned was made and executed in pursuance of that agreement. The fifteenth plea was similar to the fourteenth, except

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as to the corrupt agreement, which it alleged to be that the indenture in the declaration mentioned should be made, and averred that it was made and executed in pursuance of that agreement. Replication to the third plea, that *Trafford*, whilst the church was full of *Bradshaw* the incumbent thereof, did grant, bargain, &c. the advowson, &c. to the plaintiff as alleged in the declaration. To the fourth, that it was not corruptly, &c. agreed by and between plaintiff and *Trafford*, with the knowledge of *Uppleby*, as in that plea alleged. Similar replication to the fifth plea. Replication to each of the other pleas, denying that it was corruptly, &c. agreed as in those pleas alleged. At the trial before *Warren C. J.* of *Chester*, and *Marshall Serjt.*, at the *Chester Spring assizes*, 1821, the jury found a special verdict, in substance as follows: first, they found the identity of the several matters alleged in the two counts of the declaration as averred in the pleas; and then, that before and on the 12th day of *November*, 1819, the said *T. J. Trafford* was seised of the manor and advowson within mentioned, and that before and on the said 12th day of *November*, 1819, the within named *J. Brad-*

time of his death ; and that *J. Bradshaw*, so being such incumbent, died of the said mortal disease at half-past eleven o'clock at night of the same 12th day of *November*, 1819, to wit, at, &c. ; that on the said 12th day of *November*, 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said *J. Bradshaw* was such incumbent as aforesaid, an agreement was made and concluded between the said *T. J. Trafford*, so being seised of the said manor and advowson as aforesaid, and the said *E. V. Fox* for the sale by the said *T. J. Trafford* to the said *E. V. Fox* of the next turn or presentation of the said church, for and in consideration of 6000*l.* ; that on the said 12th day of *November*, 1819, and immediately after the making of such agreement, they, the said *T. J. Trafford* and *E. V. Fox*, in pursuance of such agreement, and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within mentioned indenture, bearing date the 12th day of *November*, 1819, and of which said indenture the said bishop hath within had oyer, and which is within set forth upon such oyer thereof, to wit, at, &c. ; that the said agreement was made, and the said indenture was sealed and delivered in the lifetime of *J. Bradshaw*, and he, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, was afflicted with the said mortal disease and in extreme danger of his life, and that his life was thereby then greatly despaired of ; and that the said *T. J. Trafford* and the said *E. V. Fox*, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, well knew and believed that the said

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J. Bradshaw was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of, to wit, at, &c. aforesaid; that the said agreement was made and concluded, and the said indenture was sealed and delivered, without any knowledge or privity whatsoever of the said *G. Uppleby*, and without any intention to present the said *G. Uppleby* to the said church when it should become vacant. But whether or not, upon the whole matters aforesaid by the jurors aforesaid in form aforesaid found, the said *T. J. Trafford* did grant, bargain, sell, and demise unto the said plaintiff, his executors, administrators, and assigns, the advowson, donation, right of patronage, presentation, and free disposition of, in, and to the within named church in the pleadings within mentioned, with the rights, members, and appurtenances thereunto belonging, in manner and form as the said plaintiff hath in the first and last counts of the declaration, or either of those counts, in that behalf alleged, or in manner and form as is stated in the oyer of the said indenture within set forth, the jurors aforesaid are altogether ignorant. And whether or not, upon the whole matters aforesaid in form aforesaid found, the said *T. J. Trafford*, whilst the said church was full of the said *J. Bradshaw*, being the incumbent thereof, did grant, bargain, sell, and demise unto the said plaintiff, &c. the said advowson, donation, right of patronage, presentation, and free disposition of, in, and to the church in the pleadings within mentioned, with the rights, members, and appurtenances thereunto belonging, in manner and form as the said plaintiff hath in the declaration in that behalf alleged, or in manner and form as is stated in the oyer of the said indenture within

within set forth, the jurors aforesaid are altogether ignorant. And whether or not, upon the whole matters aforesaid by the jurors aforesaid in form aforesaid found, it was corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said *T. J. Trafford* and the said plaintiff, in manner and form as the said defendant hath above in his within mentioned fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth pleas, or any of them alleged, the jurors aforesaid are altogether ignorant, and thereupon they pray the advice of the said justices here. And if, &c. (in the common form.) Upon this special verdict judgment was given for the defendant in the court below; whereupon the plaintiff brought a writ of error, and assigned the common errors. The case was argued in last *Trinity* term by

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Parke for the plaintiff in error. The simple question for the Court is, whether the sale of a next presentation, the incumbent being in extremis, be or be not simoniacal, the purchase not having been made with a view to the nomination of any particular person. There is neither principle nor authority for saying that such a contract is simoniacal. *Barret v. Glubb* (a) is expressly in point for the plaintiff. There an advowson was brought by *Barret*, he having notice that, at the time the then incumbent was in extremis, the question arose as to the next presentation, and it was held that *Barret* was entitled to it, the church not being actually void at the

(a) 2 *W. Bl.* 1052.

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time of the sale. That case is also reported from a MS. note in *Bac. Abr. Simony* (A). It was much discussed in *Greenwood v. Bishop of London* (a), and neither in that case, nor in any other does it appear that the propriety of the decision of the court of C. P. has been doubted. If it was correct, this case must be governed by it, for it was in effect deciding that by such a contract all future presentations passed, and if the next presentation might pass, with others, why should it not pass alone? The court below were of opinion that such would be the consequence, and therefore, in giving judgment for the defendant, said, that *Barret v. Ghubb* was not correctly decided. The question turns upon the 31 *Eliz. c. 6. s. 5.*, which was passed to prohibit patrons from making their selection of incumbents from improper or corrupt motives. The patron of the church for the time being cannot therefore take a reward for presenting. But the patron may lawfully be changed, and therefore, when the church is full, any portion of the patronage may lawfully be sold, and then the new patron cannot receive a reward for presenting. The right to convey the patronage exists to the last moment when the church is full. In *Watson's Complete Incumbent* (b), the cases where the sale of a next presentation has been held bad are collected, and it appears that every one of them is clearly distinguishable from the present. In each of them the next presentation was conveyed as a cloak for a simoniacal contract, or the clerk purchased for himself, or the purchase was made with a view to the presentation of a particular person. The leading case on that subject is *Winchcombe v. The Bishop of Winchester and Puller-*

(a) 1 *Marsh.* 292.

(b) P. 32.

ton. (a) There the next turn was conveyed to *Ebden* by the patron *Waller*, as a cover for a simoniacal contract between him and *Say*, the clerk. In *Kitchen v. Calvert* (b) it is said, that "if *A.* buys the next presentation, intending to present *B.*, and afterwards does present him, by averment and good pleading the presentment of *B.* shall be void." That shews, that in order to make the contract illegal, it must appear on the record that it was entered into with a view to present a particular person; and there the bargain was not made until the church was actually vacant. Here, by the special verdict it is expressly found, that *Uppleby* the clerk was not privy to the transaction, and that the plaintiff, *Fox*, did not make the purchase with a view to his presentation. The church was, in fact, full at the time when the contract was completed. Had the tenant for life of the advowson died under such circumstances, the next presentation would have gone to the remainderman. The only question for the Court is, whether the incumbent was then still living. They cannot entertain any nice distinctions as to the probability of an early vacancy. After avoidance at common law the presentation could not be granted, it being then a fruit fallen and a mere personal privilege, *Brookesby's case*. (c) And that explains the decision in *Baker v. Rogers*. (d) There the church was vacant when the bargain for the next presentation was made, but as that could not then be sold, the presentation by *Baker* the purchaser was in law the presentation of *Broughton* the owner of the

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(a) *Hob.* 165. *Noy.* 25. *S. C.*(b) *Lane*, 102.(c) *Cro. Elix.* 174. 1 *Leon.* 167. 3 *Leon.* 256. *Dyer*, 282., in margin, *S. C.*(d) *Cro. Elix.* 788.

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advowson; that was clearly simoniacal, for *Baker* had paid him 180*l.* for it. But as long as the church remains full that reasoning does not apply. In *Walker v. Hamersly* (a) the church was in law vacant, for the then incumbent was merely in by usurpation. This is not a case within the 31 *Eliz. c. 6.*; and in *Bishop of St. David's v. Lucy* (b), Lord *Holt* says, that this Court cannot take notice of any offences as simoniacal, except those pointed out by that statute. In *Smith v. Shelburne* (c), it was held that the purchase of a next presentation, the incumbent being in extremis, was not void. [*Best J.* That proceeded on the ground, that a father might make such a purchase to provide for a son, but that principle has since been denied.] The real objection since taken to *Smith v. Shelburne* is that which at the time was relied upon by *Anderson C. J.*, viz., that the purchase was made with the privity of the son who was to be presented. In *Com. Dig. Esglise*, (N 3.), it is cited as a contract made by the clerk, and in *Barret v. Glubb*, *De Grey C. J.* speaks of *Sheldon v. Brett* (d), which will probably be cited for the other side, as the case of a bargain made with the privity of the clerk. Upon the whole, then, it appears that at common law the right of patronage may, during plenarty, be sold, although during vacancy it cannot; and there is not a single case wherein it has been held that a sale of patronage during plenarty is rendered void by the 31 *Eliz. c. 6.*, where the contract was made without any intention on the part of the purchaser to present a particular person, and where the clerk presented was not in any way privy to the

(a) *Skin.* 90. 3 *Lev.* 115. *S. C.*(b) 12 *Mod.* 257.(c) *Cro. Eliz.* 685. See *S. C. Moore*, 916.(d) *Winch.* 63.

transaction.

transaction. Here, a negative of both those circumstances, being the strongest possible evidence of good faith in the transaction, and of the absence of corrupt motive, is found in the special verdict.

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D. F. Jones, contra It is not necessary to discuss on the one hand any of the cases where money was given by the clerk for the presentation, or where he was privy to the purchase, or on the other, those where the parties to the contract did not know that the incumbent was in extremis. The question here is, whether a grant of the next presentation, made for money, the parties knowing that the incumbent was in extremis, can be good although the clerk were not privy to the transaction. In all the cases where the sale of an advowson or presentation has been held good, the purchase has been effected with a view to have a property in the thing sold, and not merely a personal privilege. Now, here the church, although literally full, was in effect vacant. It was held very early, that by a grant of an advowson, the church being empty, the next presentation would not pass. *Jenk. 5 Cent. (a) Stephens v. Wall. (b)* It would be void on the ground of public policy, even if no money passed. In some cases it is said to be void, because the sale is of a chose in action; in others because it is a personal trust. *Bishop of Lincoln v. Wolferston. (c)* [*Holroyd J.* It is then severed from the advowson and goes to the executor.] The only question is, whether it be necessary to shew privy in the clerk. *Baker v. Rogers* shews, that under such circumstances the grant

(a) 236. c. 13.

(b) *Dyer*, 282 b. 1 *And.* 15.(c) 5 *Burr.* 1504.

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is void, although the clerk be not privy to the transaction, but he is not thereby subjected to the penalties of the statute, *Dr. Hutchinson's case* (a), and 3 *Inst.* 154. In this case too, the sale was of the next turn only, and not of the advowson. The incumbent was not merely sick, but at the point of death, and the special verdict finds that he died six hours after the contract was made. Surely it would be a fraud upon the policy of the law to hold such a contract good. The policy of the law is to avoid the danger of a simoniacal presentation, and for that reason the purchase of the next turn has been held void when effected with a view to present a particular person, *Kitchen v. Calvert*. (b) The case of *Sheldou v. Brett* expressly decided that the grant of the next avoidance for money when the person was sick in his bed, ready to die, was simony; and although it is said by *De Grey C. J.* in *Barret v. Glubb*, that the clerk was privy, yet nothing of that kind is suggested in the report. The stat. 31 *Eliz. c. 6.*, although penal, yet has received a liberal construction, in order to reach the evil for the remedy of which it was passed. *Mac-kaller v. Todderick*. (c) *Barret v. Glubb*, the only case which presses upon the defendant, is in some degree distinguishable; that was not the sale of the next turn alone, but of the advowson, and that after a long negotiation, which circumstances rebutted the idea that the bargain was made with a view to an immediate presentation. It may be asked at what period of the incumbent's life the right to dispose of the next turn ceases? It is unnecessary to determine that, for where-

(a) 12 Co. 101.

(b) *Lane*, 102.(c) *Cro. Car.* 337. 353. 361.

ever it appears that the contract was made with a view to an immediate presentation, it is a fraud upon the policy of the law, and therefore void.

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Cur. ad. vult.

ABBOTT C. J. In this case, we think the judgment of the court below ought to be affirmed. Our judgment is founded upon the language of the statute 31 *Eliz. c. 6.*, and the well known principle of law, that the provisions of an act of parliament shall not be evaded by shift or contrivance. The authorities quoted at the bar are, to a certain extent, conflicting, and not easily reconcilable with each other. The decision mentioned by *Hutton J.* as quoted in *Winch. 68.* might perhaps be a strong authority in favour of the defendant, if we were possessed of all the facts of the case, but unfortunately we are not. It is met too by the case of *Barrett v. Glubb (a)*, which certainly contains the opinion of very learned judges in favour of the validity of the sale of the next turn, made when the death of the incumbent is expected speedily to take place. But that case has not the full weight of a judicial decision, because it does not appear to have been acted upon. For, upon reference to the minutes of the decree in the *Register Book*, it appears that the Lord Chancellor decreed a conveyance of the advowson, and gave costs to the plaintiffs, the purchaser and his clerk; but he did not decree an injunction to restrain the seller from prosecuting his *quare impedit*, which we think he would have done, if he had thought the purchaser entitled to the presentation, it being clear that the seller must prevail in the *quare impedit*, if permitted to prosecute it, because the advow-

(a) 2 *W. Bl.* 1052.

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son had only been contracted for, and not actually conveyed before the benefice became void; and if the Lord Chancellor had thought the purchaser entitled to the presentation, he should have ordered the seller to present the purchaser's nominee, as in the case of a mortgage, this being the only mode in which such nominee could be entitled to institution to the benefice. Further, it appears by the register's book, and also by the report in *Dickens*, that there had been a treaty for the purchase of the advowson of some continuance before the final close of the bargain, and it does not appear that the vendor knew of the incumbent's dangerous state when the contract was made. This treaty, however, was not mentioned in the case sent by the Lord Chancellor to the Court of Common Pleas. In the present case no antecedent treaty is found by the verdict, but the contract made on the 12th of *November*, and the conveyance of that date, are the only facts found on this part of the case, and we cannot presume any other. Let us then direct our attention to the language of the statute, and to the facts found by this special verdict. The statute was made, as appears by the preamble to the fifth section, which is incorrectly printed at the end of the fourth, for the avoiding of simony and corruption in presentations to benefices, &c. By the fifth section, it is enacted, that if any person shall, for any sum of money, &c. directly or indirectly, or for or by reason of any promise of any money, &c. directly or indirectly present any person to any benefice with cure of souls, or give or bestow the same for or in respect of any such corrupt cause, or consideration, then every such presentation shall be utterly void, and the Queen and her heirs, &c. may present for that one time or turn. Now it is clear that he who enables another to do any act, which with-

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out such enabling the other could not do, may be justly said, in many cases, to do that act indirectly at least, if not directly. What then are the facts? It is found that on the 12th of *November*, 1819, *Bradshaw* the incumbent was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired of; that he continued to be so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be so greatly despaired of until the time of his death, and that he died on the same 12th of *November*, about half after eleven at night. That on the same 12th of *November*, about ten minutes after three in the afternoon, an agreement was made and concluded between *Trafford*, who was then seised of the advowson for his life, and the plaintiff, for the sale by *Trafford* to the plaintiff of the next turn or presentation, in consideration of 6000*l*. That on the same 12th of *November*, and immediately after making the agreement, *Trafford* and the plaintiff, in pursuance of the agreement, and as an expedient to carry it into effect, and to convey the next presentation alone, executed the deed, of which the defendant has had oyer (being that on which the plaintiff's title is grounded) and which purports to be a conveyance of the advowson by *Trafford* to the plaintiff and his executors for ninety-nine years, if *Trafford* shall so long live. It is further found, that at the time of making the agreement and executing the conveyance, *Bradshaw* the incumbent was afflicted with the said mortal disease and in extreme danger of his life, and his life thereby then greatly despaired of; and that *Trafford* and the plaintiff, at the time of making the agreement and executing the indenture, well knew and believed that *Bradshaw* was afflicted with the said

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said mortal disease, and was in great danger of his life, and that his life was thereby then greatly despaired of. This finding is precisely according to the allegations in the seventh and some other pleas, and it differs from the allegations in the sixth plea, by substituting the knowledge and belief found by the jury for a knowledge of the mortal disease, extreme danger, and the despair of life, and *a belief that death was fast approaching*; in which, however, there is certainly no substantial difference. Can it then be said that an agreement for the sale of a next presentation, at a moment when the incumbent is, and is also known to be, afflicted with a mortal disease and in extreme danger of life, that is, at the point of death, followed by a deed, purporting to be a conveyance, not of the next presentation, according to the agreement, but of a term, which may happen to include two or more presentations, but intended only to convey the next presentation, is not a manifest evasion of the provisions of the statute, and an indirect presentation of the clerk of *Fox*, the buyer, by *Trafford*, the seller. If it be an evasion of the statute, it must be void according to general principles, and to the opinion on this statute intimated by Lord *Hardwicke* in the case of *Grey v. Hesket* (a), and to the well known doctrine under the bankrupt laws, that a voluntary payment made by a man on the eve of bankruptcy to a favoured creditor for the purpose of giving to such creditor a particular benefit, and thereby eluding the rateable distribution for which those laws provide, is utterly void, and the money may be recovered by the assignees under the commission. In our opinion, however, the presentation made under

(a) *Andler*, 268.

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these circumstances is an indirect presentation by *Trafford*, the seller. It is, however, further found, that the agreement was made, and the conveyance executed without the knowledge or privity of *Uppleby*, the clerk afterwards presented by the plaintiff, and without any intention to present *Uppleby* to the church when it should become vacant. But the privity of the clerk is not a necessary ingredient in a corrupt or simoniacal contract, as appears by several of the cases quoted at the bar, and particularly by *Baker v. Rogers*. In that case a purchase of the next presentation for money one day after the vacancy of the benefice, was allowed to be void, because it was a fruit fallen and a chose in action not assignable; and the presentation was also held to be simoniacal, although the clerk presented by the purchaser was not informed of the facts until after his induction. Neither is an intention to present a particular individual a necessary ingredient; it may be, that the plaintiff intended to present some other individual, who, coming to a knowledge of the nature of the contract, might refuse the presentation; or, that he intended to look out among a class of persons of particular habits, doctrines, or tenets, or that he chose to gratify his liberality by making a valuable gift to some person to be selected only for his general piety and learning. But these intentions do not affect the substance of the transaction itself; the transaction may be unlawful, though the use intended to be made of it was innocent, or even laudable. The contract makes the simony, *Moore*, 914. If, therefore, the substance of the transaction be, as we think it is, a bargain with *Trafford* for money, that he shall, by means of a conveyance to the plaintiff, and thereby in the plaintiff's name, present a clerk to a benefice which the parties consider as full in name and form

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form only, but vacant in reality, the transaction is unlawful, and the presentation is void. It has been contended, that if this presentation be held void, there will be an opening to many questions and much litigation; that the only true criterion of a simoniacal contract, is the actual vacancy of the living; that if a conveyance made a few hours before the death of a sick incumbent be void, what shall be said of a conveyance made a few days, or weeks, or months, the incumbent being ill and not expected to live long. To all this I would answer, that the statute itself does not notice the vacancy of the benefice, so that vacancy is not made by any words of the statute essential to a corrupt contract; and it is consistent with *the words of the statute*, that a contract may be corrupt though the church be full. No person, I think, would doubt that a sale of the next presentation for money, accompanied by an agreement for an immediate or speedy resignation, would be within the statute. And if vacancy be not essential to a corrupt contract, we must look to the particular facts and circumstances of a case to ascertain the true nature and character of a contract. I need not here repeat the facts of this case. I hope they are such as have not often happened, and are not likely soon to happen again, and our judgment will be an authority only for a case of similar circumstances, and not for any case of a mere expectation of early vacancy from the apparent ill health, age, or infirmity of an incumbent, of which expectation the fulfilment may be long delayed or wholly frustrated; for we consider the present to be, as I have before said, the case of a church full in name and form only, but vacant in substance and reality, and known so to be by the contracting parties, who dared not to exhibit their contract in its true shape, but endeavoured to cloak

cloak and mask it by the semblance of a conveyance, more extensive in its form, but limited in operation, by their mutual agreement to the sole object of their contract, which was an immediate and single presentation to a benefice about which the parties treated as if it was then actually vacant. For these reasons the judgment of the court below is to be affirmed.

Judgment affirmed.

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—
Fox
against
The Bishop of
CHESTER.

JOHN CARD and DAVID CANNAN *against*
WILLIAM HOPE.

COVENANT upon an indenture bearing date the 9th of December, 1818, which recited that *Card* and *Cannan* were together legally intitled, and stood possessed of, and interested in, nine sixteenth shares or parts of the ship *Herefordshire*, at that time commanded by Captain *John Money*, and under a charter-party for freight to the *East India* Company for six successive voyages to and from the *East Indies*, two of which voyages had been performed; and that the defendant, *Hope*, had contracted with *Card* and *Cannan* for the purchase of five sixteenth shares or parts of the ship at the price of 22,000*l.*, and upon the terms thereafter specified; and that *Hope* should be appointed to the command of the

A. and B.
(being owners of nine sixteenth shares of a ship, and also husbands or managing owners,) by deed, sold five sixteenths to *C.* The deed contained a covenant that *C.* should be appointed to the command of the ship, and that *A. and B.* should continue to have the management, as husbands, and should elect the tradesmen and appoint all the

officers; and that if *C.* should relinquish the command, or die, *A. and B.* should appoint such fit person to succeed him as might be approved of by him or his executors, or that he or they might nominate a fit person to the command in his stead, and that *A. and B.* should be employed as the agent of *C.* in the concerns of the ship; and if *C.* should be minded to sell all or any of his shares, he might do so, upon condition that the purchasers should abide by the stipulations in the deed, and not remove *A. and B.*, or the survivor of them, from being managing owners, so long as they should perform the stipulations on their part: Held, that although the covenant to continue *A. and B.* as *C.*'s agents in the concerns of the ship might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipulation for the appointment to the command, and the continuance of the management, it was illegal and void.

the ship, so long as they or he should be desirous to continue, and should faithfully and to the best of their or his ability attend to and conduct the concerns of the ship. And that so soon as the ship should have completed her next or third voyage, *Hope* should, if that event should not have before taken place, be appointed to the command of the ship on all her future and succeeding voyages, both for and during the continuance of the then charter-party, and such other voyages as, after the expiration or other determination thereof, she might undertake or perform; and that *Card* and *Cannan*, or the survivor of them, as such managing owner or owners, should do all necessary acts to have *Hope* effectually invested with the command of the ship according to the rules of the service of the *East India Company*; and that *Hope* should have and enjoy all the usual advantages appertaining to and to be derived from such appointment and command; and further, that in case *Hope* should from ill health, or from any other cause, retire from and resign the command, or that he should depart this life before he should be appointed to or assume the command, or while holding the same, or as the case might be, that *Card* should be at liberty to appoint a fit and proper person as a successor to *Hope*, upon such terms as might be approved of by *Hope* or his executors, &c.; or upon such terms as *Hope*, his executors, &c. might be able to obtain on the nomination and appointment of such successor; and in case *Card* should decline to appoint such successor on the terms aforesaid, then that *Hope* or his executors, &c. should be permitted to appoint in his stead a fit and proper person to the command of the ship; and that such person so appointed, should be entitled to

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 CARD
 against
 HOPE.

and homeward voyages, as he might from time to time make and have on board the same ship, whether the same consisted of goods or specie: and that *Card* and *Cannan*, or the survivor of them, as such managing owners or owner as aforesaid, should have the right of nominating and appointing all the other officers to serve on board the ship, and that *Hope* should and would, on such nomination and appointment, present from time to time, and at all times thereafter, all and every such officers to the Honourable Court of Directors of the *East India* Company, in order to their being confirmed in their respective stations: that *Card* and *Cannan*, or the survivor of them, should and might select and appoint the several tradesmen and artificers for the outfit and repairs of the ship on her several voyages, so long as the said last-mentioned right of appointment was exercised and used by *Card* and *Cannon*, and the survivor of them, to the best advantage and interest of *Hope*, and the other owners of the ship: that in case *Hope*, or his heirs, executors, or administrators, should be minded and desirous to sell and dispose of the whole or any of the said five-sixteenth shares, that he or they should be at liberty so to do, upon the condition and express proviso, that any person or persons so purchasing the whole or any of the said shares should abide by and perform all the several terms, conditions, stipulations, contracts, and agreements thereinbefore expressed, declared, and agreed, and should do no act or deed to remove or displace *Card* and *Cannan*, or the survivor of them, from being the managing owners or owner of the said ship, or the agents or agent of the then or any future captain, so long as they continued to observe and keep all the

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against
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several

authorities were cited, *Chippendale v. Tomlinson* (a), *Silk v. Osborn* (b), *Evans v. Brown* (c), *Fowler v. Down* (d), *Webb v. Fox* (e), *Flood v. Finlay* (f), *Clark v. Calvert* (g), *Wetherall v. Geering* (h), and *Brooke v. Hewitt*. (i)

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 CARD
 against
 Horn.

In the course of the argument it was suggested by the Court, that the deed itself might be void, on the ground that one of the main objects of it was a bargain for the appointment of a particular individual to the command of a ship which was then chartered for several successive voyages, and they directed a second argument upon this point. The case was again argued in this term by

Kaye, for the defendant. This deed is void, inasmuch as it appears to have been founded on a sale of the command of the ship, and the appointment and the continuing of the defendant in that command was part of the consideration for the defendant's covenant to continue the plaintiffs as managing owners. Although the covenant to continue the plaintiffs ship's husband might be legal by itself, yet if the whole deed depends upon a fraudulent contract it is void. Now it is clear, from the recitals in this deed, that part of the original bargain was, that the defendant should have the command of the ship; and it is probable, therefore, that he either paid something more for the shares in consideration of his having that command, or that his appointment was the consideration for his covenanting to continue the plaintiffs as managing owners. In either case the plaintiffs

(a) 1 *Cooke's B. Laws*, 406.(b) 1 *Esp. N. P. C.* 140.(c) 1 *Esp.* 170.(d) 1 *Bos. & Pul.* 44.(e) 7 *T. R.* 391.(f) 2 *Ball & Beatty*, 13.(g) 8 *Tamnt.* 742.(h) 12 *Ves.* 504.(i) 3 *Ves.* 253.

mand. It does not appear that the price paid for the shares exceeded their real value. At all events, the covenant to appoint the defendant to the command is an independent covenant, and per se is not illegal. As to the agreement to continue the defendant in the command, that is mere surplusage, for the owners have not the power of removing a captain without the consent of the *East India Company*. In *Blachford v. Preston (a)*, it was held that a sale of the command of a ship in the *East India Company's* service was illegal; but there, evidence was given to shew that it was contrary to the bye-laws of the company. Here, the bye-laws are not set out upon the pleadings, and the court cannot take judicial notice of them. As to the plaintiffs having the appointment of other officers, there is no danger of an improper person being appointed; because, before their appointment, they must undergo an examination, and be approved of by the Company. As to the profit to accrue to the plaintiffs as managing owners, *The Attorney-General v. Borrodaile (b)*, is an authority to shew that managing owners have a right to commission. The agreement, in fact, gave the plaintiffs no power which they did not possess before; for the majority of the share-holders in value always have the control over the appointments. The plaintiffs, as owners of nine-sixteenths might therefore have appointed to the command, and if it were a fraud upon the other owners to agree that the defendant should be appointed to the command, it must have been equally fraudulent for one person to hold nine-sixteenth shares; for by holding that number of shares, they acquired the power of appointing themselves managing owners, and of appoint-

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 CARD
against
HOPE.

(a) 8 T. R. 89.

(b) 1 Price, 148.

ing

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against
Horn

ing the captain; and having got that power, they might surely sell part of their shares, retaining in themselves the right to continue managing owners. Besides, the deed contains covenants for keeping proper accounts. In the case of a ship chartered in the common way, the owner certainly might appoint all the officers, although, where there is no stipulation to the contrary, that appointment may belong to the captain, *Rosiere v. Salkins*. (a) Nothing appears on the pleadings about the *East India Company*. This case, therefore, stands upon the same footing as any other. [*Bayley J.* The case which you state was that of a sole owner.] It applies equally to the owner of a majority of the shares, for he must have the control if he pleases to exercise it. The exercise of such a power in the *East India Company's* service is in fact less dangerous than in any other; for the choice of the voyage does not rest with the owners, and every officer undergoes a strict examination before he can be appointed. At all events, this is a question which cannot be properly disposed of by any tribunal but a jury; for fraud is not to be presumed, but ought to be expressly found.

Cur. adv. vult.

the defendant in the concerns of the ship, and to refer disputes to arbitration. To each of the first two alleged breaches of covenant, the defendant pleaded specially the bankruptcy of the plaintiff *Card*, before his refusal, concluding that by reason thereof he was discharged from his covenant. To these pleas the plaintiffs demurred; and the case was in part argued on the sufficiency of the pleas in last *Michaelmas* term. In the progress of the argument on that question, the Court suggested a doubt as to the legality of the deed itself, and directed the case to be argued upon that question, which was done in the present term; and we are of opinion that the deed is illegal and void, and that judgment should be entered for the defendant, on the insufficiency of the declaration.

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against
HORN.

It will be necessary to advert to several parts of the deed at some length, in order to make the ground of our judgment intelligible. After reading the parts of the deed before set out, the Lord Chief Justice proceeded as follows :

Upon the perusal of the deed, it appears to be a sale of five-sixteenths of the ship to the defendant by the plaintiffs, then being owners of nine-sixteenths, and husbands or managing owners of the ship, founded upon and accompanied by an agreement between those parties, that the defendant shall be appointed to the command of the ship ; that the plaintiffs shall continue to have the management as husbands, so long as they execute their duties faithfully and to the best of their ability, shall elect the tradesmen, and appoint all the officers; and further, that if the defendant shall relinquish the command, or die, the plaintiffs shall appoint such fit person to succeed him as may be approved of by him or his executors,

the command and the continuance of the management, if this its foundation be illegal, it becomes invalid, and cannot be enforced at law. And we are of opinion that this contract is illegal and void.

The command of a ship in the service of the *East India* Company is well known to be a matter of very considerable value; so likewise is the management of such a ship as her husband. And it is impossible to read this deed without seeing that it is a bargain for a profit to be derived to the plaintiffs from the appointment of the defendant or his nominee to the command; the profit being either a greater price for the shares sold, or the continuance of the management and other powers and authorities in themselves, or partaking probably of both. And we are of opinion that such a contract is void, as being contrary to the interest of the charterers and of the other owners. It may be true, as was alleged by the learned counsel for the plaintiffs, that no person can be appointed to the office of commander, mate, or other officer in the service of the *East India* Company without the approbation of the Company; but this will not alter the case, for the company are entitled not only to the security of such inquiry and examination as they may be able to make into the fitness of the persons recommended by the owners, but also to the benefit of a free, impartial, and disinterested recommendation, on the part of the owners, of the persons who are to be entrusted with so important a service as the command and navigation, on a long and distant voyage, of a ship to be freighted with a very valuable cargo, and having on board a numerous crew and many passengers.

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against
HOPE.

It

the effect of fettering the judgment, and of binding the party to concur in the nomination of particular persons, at the peril of an action, is a violation of that duty. The violation of duty becomes greater and more odious if the contract be founded on motives of peculiar gain and advantage to the contractor; all the part-owners ought to share rateably in every profit that may be made of the ship. And if such contracts could be allowed by law, they must operate as a discouragement to persons to become part owners of ships. The duty, however, is owing not only to the charterers and other part-owners of a ship, but also to all whose life or property may be embarked in her. And, consequently, a violation of the duty is contrary not only to the interest of the charterers and part-owners, but also to another most important object, namely, the protection and safety of the lives and property embarked on the sea. I have already observed, that although the charterers in this case may have the control over the appointment of the officers of the ship, yet that they are nevertheless entitled to the security of a free and impartial choice of the officers to be recommended to them. And with regard to the other owners, although it may be true that, by becoming owners at a time when a majority of the interest was vested in the plaintiffs, they knew that this majority of interest might, as it respects themselves, carry with it every power for the exercise and continuance of which this deed provides; yet they might well rely, for the faithful exercise of every authority, on the interest which the plaintiffs had in the prosperity of the ship, as being paramount to all other considerations. But this deed is calculated to deprive them of that security, because it continues a very large
part

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CARD
against
Horr.

1884.

CARR
against
HARRIS.

part of the same powers in the plaintiffs, after their interest in the ship is diminished, and may, by a still further severance, not only of the interest retained by them, but of that which they have conveyed to the defendant, accompanied with stipulations and obligations like those which are contained in this deed, ultimately place the entire management of the ship, by land and at sea, in the hands of persons who have very little interest in her. So that a deed like the present is calculated to deprive both the charterers and the other part-owners of that security to which they are entitled, and on which they must be presumed to have relied when they assumed those respective characters. For these reasons we are of opinion that judgment must be for the defendant.

Judgment for defendant.

C A S E S

ARGUED AND DETERMINED

1824.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifth Year of the Reign of GEORGE IV.

MEMORANDA.

IN the course of this vacation, The Right Honorable Lord *Gifford* was appointed to the office of Master of the Rolls, which had become vacant by the death of Sir *Thomas Plumer*.

Sir *William Draper Best*, Knight, one of the Judges of the Court of King's Bench, was appointed Lord Chief Justice of the Court of Common Pleas.

And *Joseph Littledale*, Esq., of *Gray's Inn*, was called to the degree of Serjeant at Law in the vacation, and appointed to the office of a Judge of this Court. He took his seat in this Court on the first day of this term. His motto on his rings was "Justitiæ tenax."

them to find a verdict for the plaintiff, and gave the defendant leave to move to enter a verdict in his favour, if the Court should think the third plea supported by the evidence. The jury accordingly found a verdict for the plaintiff with 1s. damages.

1824.

WEAVER
against
LLOYD.

W. E. Taunton now moved to enter a verdict for the defendant, and contended, that the jury were warranted in finding that the alleged libel was true in substance and effect. The horse's eye was shewn to be much injured, although the sight was not entirely destroyed, and the supposed order, not to admit any person into the stable was not any part of the libellous matter, it was therefore unnecessary to prove the truth of it. *Edwards v. Bell. (a)*

Per Curiam. The defendant did not succeed in proving either of his special pleas. The second plea, which distinctly averred the truth of the two facts which were not proved, clearly was not supported, and the third plea alleging that the charge was true in substance and effect, must mean that each particular of the charge was true in substance. In the case cited, the passage not proved formed no ingredient of the charge against the plaintiff. Here, the statement that he knocked out the horse's eye imputed a much greater degree of cruelty than a charge of beating him on the other parts of the body. If we were to hold this a sufficient justification, exaggerated accounts of any transaction might always be given with impunity.

Rule refused.

(a) 1 Bing. 403.

with one garden, which, however, was capable of being divided into four. It was contended for her, that the clause respecting the division of the daughter's part, in the event of her dying unmarried, applied to her part of the books only, and did not operate to give the lessors of the plaintiff any interest in the real property. The learned Judge thought that it applied to all that was left to her, and directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

1824.

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Dor dem.
GIBSON
against
GELL.

F. Pollock now moved accordingly. By the will in question, the testator first bequeathed to his daughter all his property of a particular description, and then a half-part of certain property of a different description. He then directs, that if his daughter die unmarried, her *part aforesaid*, which can only refer to that property of which she had a half-part, shall be divided by lot. The mode of division, too, explains the testator's meaning, for that is altogether inapplicable to one entire leasehold estate. [*Bayley J.* There was evidence that it consisted of four houses and a garden, capable of being divided into four.] If the words of the will can have a reasonable construction without that evidence, it cannot properly be taken into consideration.

ABBOTT C. J. I think that the expression, "her part aforesaid," applies to the whole, which, by the former part of the will, had been given to the daughter. And this construction is corroborated by the nature of the property. It is given over upon the death of the daughter unmarried. Now that is a provision much

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more

plus, it cannot be so construed as to abridge his remedy. Secondly, even if a demand was necessary to entitle the plaintiff to the money, the bringing of the action was of itself a sufficient demand. Thirdly, the plea of tender admits there was some attempt at a settlement of accounts between the parties, which supersedes the necessity of a demand, or at all events raises the presumption, that a demand of a settlement was made, and the plaintiff could not possibly know the precise sum that he was entitled to receive.

1824.

 SMYTHSON
 against
 ROUTH.

ABBOTT C. J. However the law might have stood before the passing of the act in question, I am clearly of opinion, that the right of a plaintiff to recover in such an action as the present, is limited to those cases where he has previously made a demand of the surplus. The second section of the act states, "that the officer making the distress shall deduct the reasonable charges of taking, keeping, and selling such distress, out of the money arising by the sale; and the overplus (if any) after such charges and also the said penalty or sum of money shall be fully satisfied and paid, shall be returned, *on demand*, to the owner of the goods and chattels so distrained." If we were to hold, that an action would lie for the surplus without any demand, we should convert the statute into a snare, by which every parish officer would be rendered liable to a variety of actions. If it were necessary to pay the money without demand, it would be incumbent on the officer to follow and make a tender to the party distrained upon, in whatever part of the kingdom he might happen to be. In this as in other cases, where a demand is necessary to give a right of action, the commencement of the action is not of

be sufficient where the money is payable according to any contract between the parties, for there it may be supposed, that at the time of making it, the plaintiff demanded that the money should be paid at a certain time. In such cases, bringing an action cannot properly be called making a demand, but enforcing a prior request to pay the money when due. But in other instances, such as a bond with a penalty to pay a certain sum on demand, there an express demand must be made before the action can be maintained. So in an action on a promise to pay a collateral sum on request, *Birks v. Trippett.* (a) The next question is, whether the tender admitted a demand. I think, that it admitted nothing more, than that the sum tendered was due. If at that time the plaintiff had said it was insufficient, and had demanded a further account, I am inclined to think that it would have been sufficient.

HOLROYD J. The right of action in this case is founded upon the statute, and that authorises the party levying to retain the surplus until it is demanded. Nor does that impose any hardship, for at common law, if trover had been brought for the goods, a previous demand must have been made. Neither does the tender appear to supply the place of a demand; there must be an express demand, or that which is equivalent to it. The plaintiff said he would not take the sum tendered, because it was too late, not because he claimed a larger sum. A tender admits all the facts in a special count, but if pleaded to a general count, has no effect, but that of admitting that the sum tendered is due.

Rule refused.

(a) 1 *Scam.* 22.

1824.

SIXTON
against
ROUTH.

the presumption of a grant of a right to have windows in that direction did not arise; and, secondly, that the doctrine of presumption could not apply to this case, for want of evidence to shew that the owner of the adjoining premises knew that the windows had been opened. The learned Judge thought, that upon the evidence, the windows were to be considered as ancient windows, and directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

1824.

Case
against
Law.

J. Williams now moved accordingly. A grant in this case could not be presumed, for it was unnecessary. The plaintiff needed no grant, the windows not being put out at the extremity of her land, and a grant cannot be presumed unless it be necessary in order to account for the existence of things in the state in which they are found, *Doc v. Reed*. (a) Here no unlawful act was done at first, and therefore there is no ground for presuming a grant. Secondly, there was not any evidence that the then owner of the defendant's land ever knew that the windows had been made; and in the absence of that knowledge the presumption of a grant cannot be raised against him, *Daniel v. North*. (b) Nothing done by the lessee without the consent of the landlord, would give the right, *Wood v. Veal*. (c) It should therefore have been left to the jury to say, whether they believed that notice had or had not been given to the landlord, *Darwin v. Upton*. (d)

(a) 5 B. & A. 232.

(b) 11 East, 372.

(c) 5 B. & A. 454.

(d) 2 Saund. 175 b. n. 2. See also *Gray v. Bond*, 2 B. & B. 637.

BAYLEY J. I am of opinion that a proper direction was given to the jury in this case. I do not say that twenty years possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision of *Darwin v. Upton*, it has been held, that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it. In *Bealy v. Shaw* (a) Lord *Ellenborough* says, "I take it, that twenty years exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right, in the party so enjoying it, derived from grant or act of parliament." It has been argued, that in order to found such a presumption, it must be shewn, that the first act was illegal. If so, the doctrine of presumption can never apply to windows, for a person building a house, even at the extremity of his own land, may lawfully open windows looking towards the adjoining property. If his neighbour objects to them he may put up an obstruction, but that is his only remedy; and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them. This case is much stronger, the right is proved to have existed for thirty-eight years; the commencement of it is not shewn. It is possible that the premises, both of the plaintiff and defendant, once belonged to the same person, and that he conferred on the plaintiff, or those under whom she claims, a right to have the windows free from obstruction. *Daniel v. North* has been relied upon, to shew that the tenancy of Mrs. *Percy* rebutted the presumption of a grant; but this is a very

1824.

 Cross
against
Lewis.

(a) 6 East, 208.

different

been prevented. So a man may on his own land erect a house, with windows looking towards his neighbour's premises; at first they may be obstructed, but if no interruption is offered, he may at length prescribe for them as ancient windows, and claim to have them free from obstruction, as in *Bland v. Moseley*, cited in *Aldred's case*. (a)

1824.

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Cross
against
Lawn.

Rule refused.

(a) 9 Co. 57.

CAMBRIDGE *against* ANDERTON,

Saturday,
May 8th.

ASSUMPSIT on a policy of assurance on the ship *Commerce*, from *Quebec* to *Bristol*, stating a loss by perils of the sea: Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings after last *Hilary* term, it appeared that the *Commerce*, with a cargo on board, sailed from *Quebec* on the 8th of *July*, 1823, and about 220 miles below *Quebec* got upon rocks in the river *St. Lawrence*, in foggy and tempestuous weather. She was there much injured, and surveyed by experienced persons, who gave it as their opinion, that the expence of getting her off the place where she was lying, (if that could be accomplished,) and repairing her, would far exceed the value of her when repaired; under these circumstances the captain and the agents for the plaintiff sold the ship, with her certificate of registry. The purchaser did succeed in getting her off the rock, took her back to *Quebec* and repaired her; she afterwards sailed on a voyage to *England*, but was lost in the *Gulph* of *St. Lawrence*: the plaintiff never gave any notice of abandonment to the underwriters. The Lord Chief

Where a ship is so much injured by perils of the sea as not to be repairable at all, or not repairable without an expence exceeding her value when repaired, the assured may recover for a total loss without giving notice of abandonment.

was a mere wreck, the name which you may think fit to apply to it cannot alter the nature of the thing.

1824.

CAMBRIDGE
against
ANDERTON.

BAYLEY J. I take the legal principle to be this ; if, by means of any of the perils insured against, the ship ceases to retain that character and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without giving any notice of abandonment. This was decided in *Read v. Bonham (a)*, and although *Richardson J.* there differed from the rest of Court, that was only upon the facts of the case, and not as to the legal principle upon which it was decided.

HOLROYD J. (b) Where the damage sustained makes the loss a total loss, it is unnecessary to give notice of abandonment.

Rule refused. (c)

(a) 3 B & B. 147.

(b) *Littledale* was in the Bail Court during the argument, and gave no opinion.

(c) See *Robertson v. Clarke*, 1 Bing. 445.

RAVENGA against MACKINTOSH.

Saturday,
May 8th.

THIS was an action for a malicious arrest : plea not guilty. At the trial before *Abbott C. J.* at the *London* sittings after last *Hilary* term, the following It is a good defence to an action for a malicious arrest, that the defendant, when he caused the plaintiff to be arrested, acted bonâ fide upon the opinion of a legal adviser of competent skill and ability, and believed that he had a good cause of action against the plaintiff. But where it appeared that the party was influenced by an indirect motive in making the arrest, it was held to be properly left to the jury to consider whether he acted bonâ fide upon the opinion of his legal adviser, believing that he had a good cause of action.

defendant's solicitor refused to furnish any documents. It appeared further, that before the action was commenced, the defendant laid a case, and all his documents and papers, before a special pleader of considerable experience. One of the queries put in that case was, whether the *Columbian* government was bound by the contract made by *Mendez*; another was, whether *Ravenga* (who at the time when that contract was made, held the office of minister for foreign affairs in the *Columbian* republic) was personally liable. Another query was, whether, in the event of *Mackintosh* causing *Ravenga* to be arrested, an action would lie at the suit of the latter for a malicious arrest, in case it should turn out that he was not liable? Upon this case an opinion was given, first, that the *Columbian* government was liable; secondly, that *Ravenga*, as a member of that government, was personally responsible; and thirdly, that an action would not be maintainable by *Ravenga* against *Mackintosh* for a malicious arrest, in case the court should be ultimately of opinion that *Ravenga* was not personally liable. On the 5th of *March* 1823, the defendant made an affidavit, that *Ravenga* was indebted to him in 90,000*l.*, for goods sold and delivered, and on the same day a bill of *Middlesex* issued. The plaintiff was arrested on the 20th of *March*, and remained in custody until the 17th of *May*, when he was discharged upon bail. No further proceedings were taken in the action until *Michaelmas* term, when a peremptory rule to declare was taken out, and a declaration delivered, but on the 15th of *December*, a rule to discontinue was taken out, and the defendant paid the taxed costs. Upon this evidence, the Lord Chief Justice directed the jury to find a verdict for the defendant, if they were of

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 against
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action.] But still there is an indirect motive, and consequently, there is malice in the defendant, his object being, not to obtain his debt, but possession of the house. Whether there was probable cause or not is a question of law to be decided by the judge. (a) When the facts are doubtful, the evidence may be left to the jury, in order to ascertain the facts; but as soon as they are ascertained, it becomes a question of law, and that question was not decided at the trial of this case. It appeared in evidence, that *Mackintosh* had a probable cause of action against *Ravenga*, for he had a debt due to him from the *Columbian* government; and he was advised, by a person of competent skill and knowledge, that *Ravenga*, who was a member of that government, was personally liable for that debt. Although, therefore, he had not an actual, he still had a probable cause of action against *Ravenga*. He had a reasonable ground for believing that he had a cause of action, and that constituted a probable cause.

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BAYLEY J. I have no doubt that in this case there was a want of probable cause. I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts bonâ fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description. A party, however, may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury, whether he acted bonâ fide on the opinion, believing that he had a cause of action. The jury in this case have found, and there

(a) *Bull. N.P.* 14.

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WILLIAMS *against* GLENISTER.Saturday,
May 8th.

TRESPASS for false imprisonment. The declaration stated, that the defendant, at the parish of *Tring*, &c., assaulted the plaintiff, and took him out of a certain church there, to a certain inn, and there imprisoned him for two hours. Pleas, first, not guilty; secondly, a justification, which was immaterial, as the defendant, being a constable, was entitled to give the whole defence in evidence under the general issue. At the trial before *Alexander C. B.*, at the last assizes for the county of *Hertford*, it appeared, that on *Sunday* the 24th of *August* last, the plaintiff presented a notice to the parish clerk at *Tring*, and desired him to read it. The clerk, after consulting the minister, refused to do so. After the Nicene creed had been read, and whilst the minister was walking from the communion-table to the vestry-room, and no part of the service was then actually going on, the plaintiff stood up in his pew and read the notice, which was to this effect: "Take notice, that a vestry will be held in this church, on, &c., to choose new churchwardens in the place of the present;" whereupon the minister desired the defendant, a constable, to take him out of the church. The defendant accordingly took him from the church to an inn, where he detained him for an hour after the service was over, and then allowed him to go, upon promising to attend before a neighbouring magistrate the next morning. The plaintiff accordingly did attend there, when he was dismissed by the magistrate, no complaint being made against him.

Where the parish clerk refused to read in church a notice which was presented to him for that purpose, and the person presenting it, read it himself at a time when no part of the church-service was actually going on: Held, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate.

shall be allowed, set forth, or authorised by the queen's majesty, &c., every such offender and offenders in any the premises, his or their aider, procurer, or abettor, immediately and forthwith after any of the said act or acts, or other the said misdemeanors so committed, done, or made, at any time or times after shall be apprehended and taken by any constable or churchwarden of the said parish, town, or place where the said offence shall be so committed, or by any other officer, or by any other person then being present at the time of the said offence so unlawfully committed; which person or persons so apprehended, with convenient speed shall be brought and carried to any justice of peace within the said shire, or within any city, borough, &c., where the said offence shall be so committed:" and then power is given to the justice to punish the offender. And again, by the 1 *W.&M. c.18. s.18.*, it is provided, "that if any person shall willingly and of purpose, maliciously or contemptuously come into any cathedral, parish church, chapel, or other congregation permitted by this act, and disquiet and disturb the same, or misuse any preacher or teacher, such person, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties, to be bound by recognizance in the penal sum of 50*l.*, and in default of such sureties, shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence, shall suffer the pain and penalty of 20*l.*, to the use of the king." [*Abbott C. J.* In order to bring the case within those statutes, must it not appear that the disturbance was wilful and malicious?] The act of reading a notice, in the manner and at the time when the plaintiff did it, could not but disturb

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BOULTON *against* CROWTHER.

THIS was an action against the defendant, as clerk to the trustees for putting in execution an act of parliament, the 56 G.3. c.51., entitled "An act for enlarging the term and powers of several acts so far as relate to the roads from *Birmingham* through *Wednesbury* to *High Bullen*." The declaration charged that the defendant wrongfully and injuriously caused to be banked up, raised and elevated, the highway adjoining the plaintiff's pleasure ground and premises, to a height and level exceeding the previous ancient and accustomed height and level of the highway, and the level of the pleasure ground and premises, and thereby obstructed and stopped up the plaintiff's entrances from the highway through his gates into his pleasure-ground; and that large quantities of gravel, stones, and mud, accumulated in the highway so raised, fell into the plaintiff's pleasure ground and injured his plantations. Plea, not guilty.

At the trial before *Park J.*, at the last assizes for the county of *Warwick*, it appeared that the road mentioned in the declaration, adjoining to the plaintiff's pleasure-ground, had been lowered in one part and raised in another by the order of the trustees of the roads; so that the entrance gates to his premises situate next those parts of the road could not be used by persons coming to his premises with carts

By the general turnpike act, the trustees of roads are authorised to divert, shorten, alter, or improve the course or path of any of the roads under their management, and divert, shorten, vary, alter, and improve the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same; and through or over any private lands tendering, or making satisfaction to the owners thereof and persons interested therein for the damage sustained thereby: Held, that under this clause, the trustees are authorised to lower hills and raise hollows: Held, secondly, that the trustees are

not liable to an action for a consequential injury resulting from an act which they are authorised to do.

and

opinion, then to find for the defendant. The jury having found a verdict for the defendant,

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Jervis now moved for a new trial. The trustees were not justified in doing the act complained of, so as to cause an injury to the plaintiff's property. The act of parliament authorised them in general terms to alter and improve the course or path of the road. They were bound to do that in such a manner as not to injure the property of another. This is distinguishable from the case of the *Plate Glass Company v. Meredith* (a), because there the act of parliament authorised the commissioners to pave the street, and it appeared that it could not have been done by any other means than those pursued. Assuming, however, that the act itself was lawful, still as the plaintiff has sustained a consequential damage resulting from that act, the defendant is liable in this action; although the trustees were acting in discharge of a public duty. *Leader v. Moxon* (b) is an authority expressly in point. And in *Roberts v. Read* (c), it seems to have been assumed, that the defendants were liable for a consequential injury resulting from an act done by them in their character of surveyors of the highway. Here, if the road had been diverted through the lands of the plaintiff, the trustees must, under the act of parliament, have tendered satisfaction, not only for the land taken, but for any damage resulting from the road passing through his land. But there is no provision in the act of parliament, by which the trustees are compelled to

(a) 4 T. R. 794.

(b) 3 Wils. 461. 2 Bl. 924.

(c) 16 East, 215.

(d) *Sutton v. Clarke*, 6 Taunt. 34.

compensate

most common and ordinary modes of improving the course or path of the public roads; and when the legislature gave the trustees, in general words, the power to improve the course or path of the public roads, it must be understood as giving them the power to effect that improvement by the usual and ordinary mode, viz. by raising or lowering the roads. If, then, the act of parliament gives an authority in terms to the trustees to alter and improve the course of the path of the roads which are under their care and management, I am clearly of opinion that the lowering of hills in a public road was an act which they were authorised to do under the terms, "improve and alter the course or path of the road." Then, if the act done be an act which they were authorised to do, the next question is, whether any individual who has sustained some special injury from the act done, can maintain an action at the common law. That he cannot, is expressly laid down by Lord *Kenyon* and *Buller J.* in the case of the *Plate Glass Company*. The language used by Lord *Kenyon* is very strong, and also very general. He lays it down as a principle, that if the commissioners act within their jurisdiction, the action at common law cannot be maintained, so that if the statute does not give the individual a remedy, he is without any; and the same rule is laid down by *Buller J.* It seems to me, that that case is a distinct authority as to the second point now raised. The act of parliament, I think, authorised the trustees to do what they have done. If, in doing the act, they acted arbitrarily, carelessly, or oppressively, the law in my opinion has provided a remedy. But the fact of their having so acted is negatived by the finding of the jury. I am therefore

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the pavement so as to obstruct the plaintiff's windows. In this case it appears to me, that the defendants have not exceeded their authority; and the jury having found that they did not act arbitrarily, wantonly, or oppressively, I am of opinion, that being public officers having a public duty to perform, they are not liable for a damage resulting to an individual from an act done by them in the discharge of that public duty.

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HOLROYD J. I think that the law was most correctly laid down to the jury by the learned judge. The trustees had a public duty imposed upon them by an act of parliament. The act complained of was done by them in the execution of that duty, and was one which they had a competent authority to do. I am of opinion, that no action will lie for what they have done in the execution of that public duty, unless they exceeded the authority entrusted to them, or abused that authority, by acting arbitrarily, wantonly, or oppressively, in the mode of carrying it into execution. It would be absurd to hold, that an action would lie against them, for doing an act which they are empowered by act of parliament to do. The act done being itself lawful, can only become unlawful in consequence of the mode in which it is carried into execution; and here the jury have, by their verdict, negatived the fact of the act having been done carelessly, wantonly, or oppressively.

LITLEDALE J. I also think that this action cannot be maintained. I agree that a private individual must so use his own land as not to injure that of another, but the private individual acts for his own benefit, and he ought not to obtain a benefit at the expence of his neighbour. But where an act of parliament vests a power in

where the act of parliament does not provide for compensation, the action is not maintainable. In *Sutton v. Clarke*, Lord C. J. Gibbs lays it down, that trustees are not liable. In *Jones v. Bird* (a) the commissioners were held responsible for an act done by them in the discharge of their duty, but it was expressly found, that they had acted carelessly and negligently. It was assumed, however, that if they had acted with due care, they would not have been responsible. Upon the general principles of law, as well as upon the authorities, I am of opinion that this action is not maintainable.

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Rule refused.

(a) 5 Barn. & A. 837.

DAVEY against RENTON.

IT appeared by the affidavit in this case, that the defendant had been arrested and held to bail, upon an affidavit of debt for 15*l.* and upwards, for goods sold and delivered; that he paid into court the sum of 6*l.*, which was taken out by the plaintiff. The defendant was a baker, and had purchased flour of the plaintiff. On the 14th May, 1821, the accounts between them were settled, and the balance paid, and a receipt in full given. Subsequently, the plaintiff supplied the defendant with two parcels of flour, amounting to 24*l.*, and the defendant paid 18*l.* on account of these. On the morning of the day during which the affidavit of debt was sworn, the defendant being entitled to deduct 5*s.* 6*d.*, for part of the flour which was damaged, tendered to the plaintiff 5*l.* 14*s.* 6*d.* The plaintiff refused to receive this sum, and the defendant afterward paid

By the statute
43 G.3. c.46.
s.3. costs are to
be allowed to a
defendant ar-
rested without
probable cause :
Held, that the
statute does not
extend to cases
where the de-
fendant pays
money into
court and the
plaintiff takes
it out, although
it be a much
smaller sum
than that for
which the de-
fendant is
holden to bail.

general rule, that where money is paid into court by the defendant, and taken out by the plaintiff in an early stage of the cause, that that shall not be considered as a sum recovered by the plaintiff, within the meaning of the statute. The fact of the plaintiff's taking the money out of court is not conclusive against his right to recover a larger sum; he may have been induced to accept the smaller sum, to save the expence of litigation. It is the sum accepted by the plaintiff, in lieu of the sum which he might perhaps have recovered if he had proceeded to judgment. We are all of opinion that the statute does not apply to such a case.

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 DAVEY
against
RENTON.

Rule refused.

The KING *against* The Undertakers of the AIRE and CALDER Navigation. Wednesday,
May 18th.

UPON an appeal, by the undertakers of the *Aire* and *Calder* Navigation, against a rate or assessment made for relief of the poor of the township of *Castleford*, in the West Riding of the county of *York*, the sessions confirmed the rate, subject to the opinion of this Court, upon the following case. On the rate in question being produced, it appeared, that the property in respect of which the defendants were rated was specified; but with respect to all the other individuals charged thereby, it altogether omitted to state the property in respect of which they were rated. The first of those assessments was as follows:

A poor-rate must shew upon the face of it in respect of what property the assessment is made upon each individual charged by the rate.

| occupier, | rate, | assessment, |
|-----------------------|--------------|-------------|
| <i>Ashton Joseph;</i> | 1l. 8s. 9d.; | 2s. 10d.; |

and all the other assessments were in a similar form.

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The KING *against* The Inhabitants of POLES-
WORTH.Wednesday,
May 12th.

UPON appeal, against an order of two justices, whereby *Hannah Brindley* was removed from the parish of *Polesworth*, in the county of *Warwick*, to the parish of *Saint Peter*, in the parish of *Derby*, in the county of *Derby*, the sessions quashed the order, subject to the opinion of the court on the following case:

The pauper derived her settlement from her father, *William Brindley*, who being legally settled in the parish of *Saint Peter's, Derby*, in *December, 1784*, agreed with one *William Boolows*, his uncle, then resident in the parish of *Polesworth*, to serve him for three years, at 1s. per day, when he had work for him to do; and when he had not work for him he was not to be paid; *Boolows* told him at the same time he should not have work for him all the year round, particularly in the winter, and that when he had not work for him he might get work from other people. After making the agreement, *William Brindley* went to work in the collieries, until the spring of the year 1785, and then went to work with his uncle, according to the agreement, and remained with him about nine months, when his uncle told him he had no employment for him, and he went and worked several weeks with a *Mr. Barrett*, of *Pooley Hall*, as a labouring man, and after that, his uncle having again work, he returned to him, and continued to work for him about nine months longer, when he quitted him without his leave and went to *Birmingham*, from whence

An agreement was made between *A.* and *B.* that the latter should serve for three years at 1s. per day when *B.* had work to do, and when he had no work, *A.* was not to be paid. At the time when the agreement was made, the master told the servant that he should not have work for him during the whole year, and particularly during the winter, and that when he had not work for him he might get work from other people: Held, that this was an exceptive hiring, and that the pauper having worked for other people during the winter season when his master had no work, and having at other times worked for his master during two successive years, did not gain a settlement.

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The KING *against* SAMUEL CLARK MARSH.Wednesday,
May 12th.

THIS was a conviction against a carrier, for having game in his possession. The conviction stated, that *Edward Howell*, of *Thetford, St. Peter's*, in the county of *Norfolk*, came before *A. B.* and *C. D.*, justices, and gave them to understand and be informed, that within three months last past, viz. on *August 25th*, 1823, *Samuel Clarke Marsh*, of the city of *Norwich*, being a common carrier, unlawfully had in his hands and custody and possession as such carrier, divers, to wit, twenty-two partridges and twenty-two pheasants of the game of *England* (such partridges and pheasants not having been sent up nor delivered or entrusted to the said *S. C. Marsh*, as such carrier as aforesaid, or in anywise howsoever, by any person or persons, in any manner qualified to kill game,) contrary to the statute, &c. The conviction then stated the summons of the defendant, his appearance, and that he pleaded not guilty. The following evidence, given by two witnesses for the prosecution, was then set out; that defendant was a common carrier, and that his waggon stopped in the parish of *Elden*, in the county of *Suffolk*, and that twenty-two live pheasants, two live partridges, and twenty dead ones, were in the waggon, and in the possession of the defendant, as such common carrier. The conviction then set out the evidence of

In an information on the 5 Ann. c. 14. s. 2. against a carrier between *Norwich* and *London*, for having game in his possession as carrier, it is not necessary to aver that the defendant is not a person qualified to kill game, nor that he had the game in his possession knowingly. The evidence for the prosecution was, that game was found in the defendant's waggon at an intermediate place between *Norwich* and *London*: Held, that there was sufficient prima facie evidence that the defendant had it in his possession as carrier. The evidence for the defendant was, that his book-keeper living at that place did not know of any game having been put in there. Neither the driver of the

waggon or his assistant was called as a witness: Held, that this evidence did not vary the case, and that the defendant was properly convicted of having the game in his possession as carrier.

dence of the said pheasants and partridges having been sent as aforesaid, by any person or persons qualified to kill game, nor any evidence that the defendant was qualified, by the laws of the realm, to kill or destroy game, or to have the said pheasants or partridges in his possession as aforesaid; it appeared to the justices that the defendant was guilty of the premises charged upon him in the information, and that they therefore adjudged him guilty of the offence.

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 ———
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 against
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Nolan and *Chitty* were to have argued in support of the conviction, but the Court called upon

Scarlett, *contra*, who contended, that the information ought to have negatived the qualification of the defendant, and also to have averred that he had the game in his possession *knowingly*. As to the first objection, the uniform course of the precedents of convictions against carriers, is to negative the qualification. *Res v. Turner.* (a) It is consistent with this information that the carrier in this case may have been a qualified person, and may actually have sent his own game by his own waggon; and if so, he clearly would not have committed an offence within the act. [*Abbott* C. J. Then he would not have had the game in his possession *as carrier*.] [*Bayley* J. The effect of your argument is, that if the carrier be qualified to kill game, he may carry the game of any person whatever, whereas the 5 *Anne*, c. 14. s. 2., declares "that any carrier having game in his possession is guilty of an offence, unless it be sent by a qualified person."] The information ought to have al-

(a) 5 M. & S. 805.

leged,

game in his possession *knowingly*. The 5 *Anne*, c.14. s.2. has no such word. It merely says, "if the carrier have any pheasant in his possession he shall be convicted." If it were necessary to aver that the defendant had actual knowledge, it would cast on the prosecutor a burden of proof which could not easily be satisfied, particularly as the carriers themselves usually residing in one place, cannot have any actual knowledge of that which may be done by their servants in the course of a long journey. I am of opinion that it is not a sufficient defence for a carrier, in any case of this description, to shew that he did not know that the particular parcel contained game, although it might be a good defence to shew that it was put into the waggon by the servant for his own benefit, and contrary to the orders of, and in fraud of his master. As to the evidence, that was entirely for the consideration of the justices, but I think there was sufficient evidence to justify the conviction. It appeared that the hampers containing the game were in the defendant's possession, in his waggon employed in his business. That was, therefore, *primâ facie* evidence that the game was in his possession *as carrier*. And that was not rebutted by the evidence given for the defendant. For it appears merely that the book-keeper at *Thetford*, at an intermediate place between *Norwich* and *London*, did not know of any game having been put into the waggon there. The *Norwich* way bill was not produced, and the game may therefore have been put into the waggon at *Norwich* with the actual knowledge of the defendant. Neither the waggoner nor his helper was called as a witness. The evidence for the defendant left the case, therefore, just where the evidence for the prosecution left it. That being so, I am
of

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to the order of the defendant, and for the benefit of his servant; and no such evidence having been given, I think the defendant was properly convicted.

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The King
against
Mason.

LITTLEDALE J. I am of opinion, that it is not necessary in an information against a carrier for having game in his possession to negative the qualification of the defendant. The 5 *Anne*, c.14. s.2. creates this offence, and it does not except the case of a carrier who is himself qualified to kill game. The clause does contain one exception, and that shews that it was not intended that any other exception should be allowed. I think, therefore, that it would not be any defence to a charge against a person for having game in his possession as a carrier, to shew that he was a person qualified to kill game. If he could shew, indeed, that it was his own game, that would negative the fact of his having it in his possession in his character of a common carrier. The fourth section makes it an offence for persons not qualified to keep greyhounds, &c. or other engines to kill or destroy game, but nothing is said in the second section as to the qualification. I doubt much whether it would be any defence upon the merits that the defendant himself did not know that the particular parcel contained game. A master in some cases is answerable criminally for the act of his servant, when the act is done by the servant for the benefit of the master and in the course of his employment. Thus if a servant in the course of his employment sells a libel, the master is subject to an indictment. I think that, in this case, the master was properly convicted. The game was found in his wagon, employed in the course of his business as a carrier. That raises a presumption *prima facie*, that he knew it was

birth an idiot, and at *Richard's* death was twenty-one years of age. In the year 1820, long after the marriage of *Richard* and *Millicent*, the estate was mortgaged for a term of 1000 years by *Richard*, to secure the payment of 100*l.* The mortgagee received from the tenant the full half year's rent, which accrued after the death of *Richard* at *Michaelmas* last, out of which he paid the sum of 3*l.* to the pauper *M.*, and took from her the following receipt; "The 7th *December*, 1822, received of the heir at law of my late husband, *R. Reynolds*, deceased, the sum of 3*l.*, by the payment of *Richard Hauchin*, (the tenant,) being my third share, as his widow, of the half year's rent of the freehold part of his estate at *Thornwood* common, in *Northweald Bassett*, due *Michaelmas* last." *R. R.* lived in *Magdalen Laver*, and after his death the pauper, his widow, resided in that parish for some months, and then hired and lived in a cottage in *Northweald Bassett*, which was not on the husband's estate. Before her residence of forty days had been completed in that parish, she became chargeable, and was removed.

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 against
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 ants of
 NORTHWEALD
 BASSETT.

Brodrick and *Stephen* in support of the order of sessions. The question here is, whether the magistrates had power to remove the pauper, not whether her residence in *Northweald Bassett* was such as would confer a settlement. For it does not necessarily follow, that a person is removeable if the residence will not confer a settlement, *Rex v. Leeds.* (a) The statute 12&13 *Car.2.* c.12. gives the power of removal, and the question will be, whether the pauper in this case had such an interest

(a) 2 *Bolt.* 147.

dower.] The title of the widow to dower is consummate on the death of her husband, the assignment is a mere form. And, although the right of entry is suspended until the assignment has been made, that is merely for convenience, and not because there is an adverse right, as where an estate tail is discontinued. Secondly, the pauper was in the actual receipt of a part of the rent, which was paid to her as dower, that is equivalent to an assignment. The want of a formal assignment of dower is nothing in equity, *Duke of Hamilton v. Mohun*. (a) [Abbott C. J. The payment in this case was made by the mortgagee, who had not power to bind the heir.]

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—
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against
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ants of
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BASSETT.

Marryat, (with whom were *Jessopp* and *Knar*,) contra. Until the assignment of dower, the widow had no such interest as could give her a settlement or make her irremoveable. It may be admitted that a person may be irremoveable, although not in a situation to gain a settlement by residence, but that must be, because he cannot be taken away from his own. All the decisions upon questions of settlement by estate have turned upon the pauper's right of possession. In *Rex v. Horsley*, the pauper had the sole right of possession, no adverse interest could be obtained without her consent. Here, the title to the freehold was in the heir, he might have taken possession, and no person could dispute his right. The widow, indeed, had a right to a portion for dower, but there is a great difference between a right to something in possession, and a right to have something assigned. (He was then stopped by the Court.)

(a) 1 P. W. 122.

1824.

MORGAN *against* PALMER.Tuesday,
May 18.

ASSUMPSIT to recover a sum of 4s. paid by the plaintiff, who is a publican in the borough of *Great Yarmouth*, to the defendant as mayor of that borough, and claimed by the defendant as having become due to him on granting to the plaintiff his annual licence as a publican. At the trial before *Garrow B.*, at the *Norfolk Lent* assizes, 1823, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case. In the month of *September*, 1822, a meeting was duly held by the defendant, (who, in his character of mayor, was then one of the justices of the peace in and for the borough,) and by another justice of the peace in and for the borough, for the purpose of renewing the annual licences of the publicans in the borough. The plaintiff attended at that meeting in order to obtain a renewal of his licence, and the clerk to the justices, who is also town clerk, and clerk of the peace for the borough, on granting to the plaintiff his licence, demanded a sum of 12s. 6d., which the plaintiff accordingly paid. The clerk then paid over to the defendant a sum of 4s., part of the sum of 12s. 6d. which he had

In assumpsit for money had and received, it was proved that *Yarmouth* has been a borough from time immemorial, and that until the time of *Queen Anne* the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By stat. 1 Ann. st. 2. c. 7., all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed, which was done by charter in the following year. At a meeting duly holden before the defendant, then mayor, (he being by virtue

of his office a justice of peace,) and another justice, for granting and renewing the licences of publicans, the plaintiff applied to have his licence renewed, and upon having it done, was required to pay, amongst other fees, the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of sixty-five years: Held, first, that the defendant was not entitled to take any such fee; for the payment for sixty-five years did not raise a presumption that it had been immemorially paid to the bailiffs or mayor of *Yarmouth*, inasmuch as licences were not granted until the reign of *Ed. 6.*, and the defendant, as justice of peace, was not entitled to any fee for granting the licence. Secondly, that the defendant was not entitled under the 24 G. 2. c. 44. to notice of the action about to be brought against him, for that the fee could not have been taken by him as a justice, *colore officii*. Thirdly, that the payment was not voluntary so as to preclude the plaintiff from recovering the money in this action.

3 B 3

received,

usual and accustomed fee for granting it. No notice of the action was given previously to its commencement. The questions for the opinion of the Court were, first, whether the plaintiff was bound to give notice of the action previously to bringing the same; second, whether the defendant was entitled to receive the said sum of 4s.; third, whether the plaintiff, having paid the said sum of 4s. in the manner above stated, was entitled to recover it back in this action. The case was now argued by

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against
PALMER.

Rolfe for the plaintiff. The defendant was not entitled to claim the money in dispute, and the plaintiff may recover it back in this form of action, without giving notice under the 24 G.2. c.44. The licensing of public houses arose out of the 5&6 Ed.6. c.25., and neither that or any subsequent statute on the subject authorises the taking such a fee as was demanded by this defendant. If it be legal, the legality must depend upon something not found in any statute. It is certainly found that the borough of *Yarmouth* is a borough by prescription, and that a charter was granted in the 2 *Anne*; but that only leaves the matter in the same situation as before, giving no other fees to the mayor than those which were before lawfully payable to the bailiffs. It must be contended on the other side, that before the introduction of statutable licensing, this fee might have been claimed for some customary licensing in this borough. (He was then stopped by the Court as to that point.) Then as to the notice, the 24 G.2. c.44. does not extend to an action for money had and received, as appears by *Umpelby v. M^cClean* (a), which was an action against

(a) 1 B. & A. 42.

existence of an usage for a much shorter period than sixty-five years, the time spoken to in this case, has been held sufficient to establish an immemorial usage, *Rex v. Joliffe*. (a) It appears that alehouses existed long before the time of *Ed.6.*, from the statute first requiring that they should be licensed. There may, therefore, have been some form of permission to keep an alehouse granted in this borough before that time, and a fee may have been lawfully taken for it. Now all fees, before payable, were confirmed by the stat. 1 *Anne*, and the charter 2 *Anne*. Thirdly, the payment was made by the plaintiff voluntarily with a full knowledge of all the circumstances, he cannot, therefore, now recover it back, *Knibbs v. Hall* (b), *Bilbie v. Lumley* (c), *Brisbane v. Dacres*. (d)

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ABBOTT C. J. I am of opinion that the plaintiff is entitled to recover in this action. The first and main question is, whether the defendant had any legal authority to demand the money in dispute. It has been conceded, that it must be due to him as mayor, independently of his character of justice of peace. And, indeed, it could not be put on any other ground, for the money is claimed as an immemorial payment, and the interference of justices of peace in granting licences clearly arose since the time of legal memory. It is found that the payment was claimed for granting a licence and that it has been taken for a long period of time. We cannot, however, thence presume that the mayor was entitled to the payment by any immemorial usage,

(a) 2 B. & C. 54.

(b) 1 Esp. 84.

(c) 2 East, 469.

(d) 5 Taunt. 143.

because

quence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, "that which you require shall not be done except upon the conditions which I choose to impose," no person can contend that they stand upon any thing like an equal footing. Such was the situation of the parties to this action. The case is therefore very different from *Brisbane v. Dacres*, and our judgment must be in favor of the plaintiff.

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BAYLEY J. I am of opinion, that the defendant was not entitled to any fee for granting a licence to the plaintiff; that the latter is entitled to recover it back in an action for money had and received, and that the defendant was not entitled to a month's notice of that action before it was commenced. The defendant must have taken the fee as mayor, he had no pretence for claiming it as a justice of peace. If it had been found by the jury that, by immemorial custom, no person could carry on trade in the borough of *Yarmouth* without a licence from the corporation, even supposing such a custom to be good, the money would have been received for the use of the corporation. There is not, however, any thing to shew the existence of such a custom, and the money was received for the individual benefit of the defendant as mayor. As a justice he had a public duty to perform, and had no right to any remuneration for it. Then, as to the question whether the money can be recovered in this action; if it had been a free and voluntary payment, there might be some difficulty; but I entirely agree with the observations of my Lord Chief Justice, which shew, that the payment was by no means voluntary. There is also another
ground

to take money for the exercise of such a discretion would be good in law, is, I think, very doubtful, for the reasons given by my Brother *Bayley*. In this case the licence is stated to have been granted by the defendant, the mayor of the borough, and another justice. It is clear, therefore, that they must have acted as justices, and as such, their only power of granting licences is given by the statute before mentioned. There was not, then, any pretence for claiming the payment in question. Neither was it necessary to give notice of the intended action. If the money had been taken by persons in the execution of their duty as justices, as for instance upon a conviction, then the case of *Greenway v. Hurd* would have applied, and notice would have been necessary. But this case is very different; for, even supposing that the defendant took the money in consequence of having done some act as a justice, (and it should be remembered, that although two justices acted, yet the money was taken by the defendant for himself alone,) still it could not be considered as taken in the execution of his office; and therefore, according to *Irving v. Wilson*, he would not be entitled to notice. Thirdly, I think that the money may be recovered in this action, and that it does not fall within that class of cases which apply to voluntary payments.

LITTLEDALE J. I am of opinion that this defendant has no right to retain the money which was paid to him by the plaintiff. He had not any legal authority to make the charge, either as mayor of the borough or as a justice of peace. The granting a licence was a public duty imposed by law, and for the execution of that he had no right to any payment. The claim can only be

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Here, the plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence. I think, therefore, that he is entitled to recover it back in this action.

Judgment for the plaintiff.

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against
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The KING *against* The Inhabitants of HALLOW, *Wednesday,*
May 19th.

UPON an appeal, against an order of two justices, for the removal of *Thomas Hewett, Elizabeth* his wife, and their two children, from the parish of *Powick*, in the county of *Worcester*, to the parish of *Hallow*, in the same county, the sessions confirmed the order, subject to the opinion of the Court of King's Bench, upon the following case. The pauper, *Thomas Hewett*, gained a settlement in the parish of *Hallow*, about fourteen years ago, by a hiring and service for a year in that parish. At the expiration of that service the pauper went into the service of one *John Price*, of the parish of *Tibberton*, in the said county, having been previously hired by *John Price*, at *Pershore Mop*, a few days before *Old Michaelmas*, when the pauper's service in *Hallow* expired, to serve him the said *John Price*, as waggoner's boy, from the said *Old Michaelmas* to the *Old Michaelmas* following, at the wages of 5*l.* The pauper went into the service of the said *John Price*, according to this hiring, and remained with him, serving in the parish of *Tibberton*, till about a month before the *Old Michaelmas-day* at which his service with *John Price* was to end, according to the said hiring; when disputes having arisen between *John Price* and the pauper, in consequence

Where a master, who had hired a servant for a year, at the expiration of eleven months made a complaint against him before a justice of peace, and the latter, under the provisions of the 20 G. 2. c. 19. s. 2., committed the servant to the house of correction for one calendar month, which did not expire until after the end of the year for which he had been hired : Held, that this was an abiding in the master's service for a whole year within the meaning of the 8 & 9 W. 3. c. 30., and that the servant thereby gained a settlement.

of the year; neither can service during that period be implied. The case of *Rex v. Barton-upon-Irwell* (a) will perhaps be relied on by the other side, but it is very distinguishable from this. There the pauper in the whole served nineteen months, and the only question was, whether the imprisonment operated as a dissolution of the yearly hiring. Here it is not necessary to contend for a dissolution, it is sufficient to say, that the pauper did not *serve* under the yearly hiring, during the time of his imprisonment, *Rex v. North Cray* (b), *Rex v. Westmeon* (c). Had the pauper run away a month before the end of the year, then surely there would not have been a sufficient service. [Bayley J. Suppose that to have happened in the middle of the year, and that the servant had afterwards returned to his master.] If the latter received him it would amount to a dispensation. Under the 20 G.2. c.19. s.2. (d) the master had no election as to what the magistrate should do upon his complaint of the servant's misconduct. It will be urged that the magistrate having by that act power to discharge the servant expressly, and not having done so, the relation of master and servant still continued. The service, however, did not continue; if it were held that

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—
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ants of
HALLOW.

(a) 2 M. & S. 529.

(b) *Cald.* 495. 2 *Bott.* 522. S. C.(c) *Cald.* 129. 2 *Bott.* 320. S. C.

(d) By this section, it was enacted "That it shall be lawful for any justice, upon application or complaint made upon oath by any master, &c. against any servant, labourer, &c. touching or concerning any misdemeanor, miscarriage, or illbehaviour in such his or her service or employment, to hear, examine, and determine the same, and to punish the offender by commitment to the house of correction, there to remain and be corrected, and held to hard labor for a reasonable time, not exceeding one calendar month, or otherwise by abating some part of his or her wages, or by discharging such servant from his or her service or employment."

statute in question must be considered as abiding in the master's service, within the meaning of the 8 & 9 W.3. c.30. It follows, that in this case the pauper gained a settlement in *Tibberton*, the order of sessions must therefore be quashed.

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against
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ants of
HALLOW.

BAYLEY. I am of opinion that this case falls within the distinction taken by *Le Blanc J.*, in *Rex v. Barton-upon-Irwell*. He there says, "It was under the authority of the contract that his master acted when he punished him for misconduct, therefore it was not a dissolution." So here the pauper was imprisoned at the instance of the master. The latter might have pressed for a dissolution of the contract, but instead of that, there was an understanding between him and the justice, that the pauper should either beg his master's pardon or remain the rest of the year in prison. It has been conceded that that does not operate as a dissolution, and I think it may be put either as a constructive service or a dispensation. In the case cited it was held, that the servant gained a settlement, and I cannot see why the imprisonment should have a different effect at the end from that which it had in the middle of the year. It has been urged in argument, that the master, by taking the servant back, is to be considered as dispensing with his service during his absence. But the contract not being dissolved, if the servant were released from prison before the end of the year, the master would be under the necessity of receiving him. For these reasons I am of opinion, that the pauper gained a settlement in *Tibberton*, and that the order of sessions must be quashed,

1824.

BRAMWELL and Another, Assignees of the Estate and Effects of W. NOAKES, a Bankrupt, *against* M. P. LUCAS, W. THOMPSON, and T. GROVES.

Monday,
May 31st.

TROVER by the plaintiffs as assignees, to recover the value of a lease, and divers goods and chattels amounting to 280*l.* 19*s.* 10*d.*, belonging to them as assignees of *William Noakes*, and by the defendants converted to their own use. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after last *Hilary* term, a verdict was found for the plaintiffs subject to the following case. On the 7th day of *November* last, at seven o'clock in the evening, the lease and goods were seized by the defendants, *M. P. Lucas* and *W. Thompson*, who were sheriffs of *London* and also sheriff of *Middlesex*, under two writs of *elegit* issued on that day, founded on a judgment obtained by the other defendant *Groves* against the said *W. Noakes*, for 4,000*l.* damages and 84*s.* costs; and the only question in the cause was, whether *W. Noakes* had committed an act of bankruptcy prior to such seizure under the said writs. In order to prove such prior act of bankruptcy, *Scott* was called as a witness on the part of the plaintiffs, and he stated that he acted as solicitor to the bankrupt, and in that character, and upon his (*Scott's*) suggestion to the bankrupt, called a meeting of his creditors, to be held at the *George and Vulture* tavern in *Cornhill*, at twelve o'clock at noon on the 7th day of *November* last; and that, in the morning of that day, *W. Noakes* came to his,

A communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a cause.

The interference of *Scott* in this matter, and his conversation with the bankrupt, certainly did not arise out of the professional character or employment of the former, and therefore no privilege could be claimed as to that conversation. *Cobden v. Kendrick* (a), *Wilson v. Rastall*. (b) Secondly, an attorney may be called to prove an act done, *Rex v. Watkinson* (c), *Doe d. Jupp v. Andrews* (d), *Spenceley v. Schullenburgh*. (e) Here, the intention with which the bankrupt absented himself from the meeting was part of the *res gestæ*, and therefore might be proved by *Scott*.

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J. Williams contra. The cases of *Cobden v. Kendrick* and *Wilson v. Rastall* may be conceded, for there the communication to the party called as a witness was not made to him in his character of attorney. So also *Rex v. Watkinson*, *Doe v. Andrews*, and *Spenceley v. Schullenburgh*, may be admitted to be law, but there the party was called merely to speak to a matter of fact within his own knowledge, which knowledge was not derived from any communication or connection with his client. *Robson v. Kemp* (f) is not distinguishable from the present case. It cannot be said that the communication, in order to be privileged, must be made in the course of a suit, for, in *Gainsford v. Grammar* (g), Lord *Ellenborough* held the contrary, and there *Cobden v. Kendrick* and *Wilson v. Rastall* were pressed upon him as authorities against that opinion : and *Gainsford v. Grammar* is supported by *Cromack v. Heathcote*. (h) In *Brard v.*

(a) 4 T. R. 451.

(c) 2 Str. 1122.

(e) 7 East, 357.

(g) 2 Campb. 9.

(b) 4 T. R. 753.

(d) 2 Cowp. 845.

(f) 5 Esp. 52.

(h) 2 B. & B. 4.

remained there two hours, to avoid being arrested, till *Scott* returned from the meeting, and the question is, whether the whole or any part of this evidence ought to have been excluded; that *Scott* was competent to prove that the meeting was called; that it was called upon his suggestion, and that *Noakes* came to and remained at his office is beyond all doubt; but the point disputed was, whether *Noakes's* question to *Scott* and *Scott's* answer to him was not within the privilege, and we think it was not. Whether the privilege extends to all confidential communications between attorney and client or not, there is no doubt that it is confined to communications, and to communications to the attorney in his character of attorney. A question for *legal advice* may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information *as to matter of fact*, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as an attorney, and where the character or office of attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded. Was this, then, a question for legal advice, put to Mr. *Scott* in his character of attorney, or was it not a question for information *as to matter of fact*, in which the professional character of Mr. *Scott* as attorney was not considered? It can hardly be supposed, that a man could ask, *as matter of law*, whether he would be free from arrest whilst attending a voluntary meeting of creditors; but he might well ask, *as matter of fact*, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent an arrest, and

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tended, that he had gained a subsequent settlement by hiring and service. The appellants proved, that when *Williams* was about fourteen years of age he lived with his father, in the parish of *Saint Ishmael*, in the county of *Carmarthen*, and being desirous of being apprenticed to a shoemaker his father agreed with one *John Thomas*, a shoemaker in the parish of *Saint Ishmael*, to give him a guinea for teaching his son, the pauper, the trade of a shoemaker for twelve months, the father finding the pauper lodging, and every thing else during that time. The pauper served the whole twelve months under that agreement. There was no indenture or writing, but the pauper considered it as an apprenticeship, and his father and master treated and spoke to him as an apprentice during such twelve months; and his father and master told him there was a guinea paid for teaching him the trade. The pauper's father, at the end of the year, came to an agreement with *Thomas*, that the pauper should work with *Thomas* for twelve months, making shoes at 3*d.* per pair the first half year, and at 4*d.* per pair the remaining half year. The pauper worked with him about *six months* under that agreement, and then went away and worked at several places, until his marriage, which happened 1785. He soon afterwards removed to the parish of *St. Mary*.

Nolan and *Davies*, in support of the order of sessions, contended, that the pauper had gained a settlement by hiring and service in the parish of *Saint Ishmael*, for although the service under the second agreement was but for six months, yet that service might be connected with the previous service under the first agreement. That was void as a contract of apprenticeship; the service under it, therefore,

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punished for refusing to do so. The relation existing between them was that of teacher and scholar. Now, although it be clear, that services under different hirings may be connected, so as to complete the year's service, yet the whole of the several services constituting the year's service must be under a contract or contracts, creating an obligation to serve. In this case, there was not any obligation on the pauper to serve under the first agreement. That service, therefore, not being a service under a contract creating the relation of master and servant, cannot be connected with the subsequent service; and there being only a service of six months under a contract of hiring, no settlement was gained.

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LITTLEDALE J. In order to gain a settlement by hiring and service, the service must be for a year, under a contract or contracts, creating the relation of master and servant. The pauper served only six months under such a contract. The contract under which he served during the former year, created the relation of master and scholar, and not that of master and servant. The service under that contract, therefore, cannot be connected with the service under the subsequent contract, for the effect of that would be, to enable the pauper to gain a settlement by a service, partly under a contract of hiring, and partly under a contract of a different description; whereas the entire year's service ought to be under a contract of hiring.

Order of sessions quashed. (a)

(a) This case was argued later in the day than that of *Rex v. Lydd*, and when Abbott C. J. was sitting at nisi prius at Guildhall. Holroyd J. had gone to chambers before the judgment was pronounced.

pauper's contract with *Fisher*, nothing was said about his being at liberty to hire himself to, or work for other masters during the three years, but *Fisher* said he did not think he should have full employment for the pauper; he would employ him as far as he could. Whilst he was working for other people, his wife hoisted a signal by putting a flag out of the window, upon which he considered himself bound to quit his work and attend to his duty as looker to *Fisher*, for which he was originally hired; and he invariably returned to *Fisher* when so summoned, and never worked on any lands from whence the flag could not be seen during the whole of the three years. He was not, however, to do any work for *Fisher*, other than that for which he was originally hired as a looker, without receiving extra wages. His agreement with *Russell* was by the acre, and he bargained with him for a year at 14*l*. During the whole of the three years he lived on *Fisher's* land at *Midley*.

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ants of
Lynn.

Bolland and *Claridge* in support of the order of sessions. The master was entitled to demand the service of the pauper so long as the species of service which he had contracted to do required his attention. Here was a contract for three years, and an actual service to *Fisher* during that time. But it may be said that he was not under *Fisher's* control during the whole period. It appears, however, by the case that he never worked for any person but *F.* during the first year and three quarters. He therefore gained a settlement by that service. And when working for other persons during the latter part of the three years, he invariably returned to his duty as looker whenever his wife hoisted the flag. He was, therefore, under *F.'s* control during the whole time.

fill up the whole time of the pauper. Scarcely ever more than a few hours each day would be required. It is very like the case of a person employed to attend, as an occasional servant, for the purpose of brushing clothes. The master has no control over the servant as soon as he has performed the required service, and that takes up but a small portion of his time.

Order of sessions quashed.

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against
The Inhabit-
ants of
LYDD.

The KING *against* The Inhabitants of MARKET BOSWORTH.

UPON an appeal against an order of two justices for the removal of *Hannah Stain*, single woman, from the parish of *Fleckney*, in the county of *Leicester*, to the parish of *Market Bosworth* in the same county; the sessions confirmed the order subject to the opinion of this court on the following case:

The pauper was hired by, and lived with, Mrs. *W.* in the parish of *Market Bosworth*, from *Shrove Tuesday*, 1821, until *Old Michaelmas-day* following. Three weeks before the last-mentioned day, Mrs. *W.* asked the pauper "to stay again," to which she replied, that she had no objection if they could agree about wages; they agreed for 3*l.* 10*s.*, and one shilling earnest was paid. At the hiring, nothing was said as to the time for which the pauper was to serve. There was no interval between the first and second service. A fortnight before *Old Michaelmas* her mistress said to her, "*Hannah*, I have

A pauper was hired to serve for part of a year. Three weeks before the expiration of the period of service, the mistress asked the pauper to stay again. The pauper replied that she had no objection if they could agree about wages. They did agree for 3*l.* 10*s.*, and 1*s.* earnest was paid; nothing was then said as to the time for which the pauper was to serve, but a week afterwards, the mistress said to the pauper, "I have hired you, but men-

tioned no time; remember that you are hired for fifty-one weeks," to which the pauper assented: Held, that this was a good hiring for a year.

which had been a hiring for a year into a hiring for fifty-one weeks only, or whether it was a dispensation by the mistress with one week's service. Now it is laid down in Mr. *Nolan's Treatise on the Poor Laws* (a), that where the absence of the servant takes place on the master's account and at his request, the courts have been inclined to infer a dispensation, inasmuch as the absence originates with him in whom the power of dispensation is vested, and is only acquiesced in by the servant. Now, apply that rule to the present case. There having been a general hiring for a year, the mistress afterwards states to the servant that she had hired her, but that she had mentioned no time, and desires her to remember that she was hired for fifty-one weeks. The servant made no overture to the mistress for a change of the original agreement. According to the above rule, therefore, this ought to be construed to be a dispensation: the mistress acknowledges that there had been a hiring, and if she intended to explain the original agreement, her explanation of it was false; for in the first instance, there is a hiring for a year at an entire sum of 3*l.* 10*s.*, and there is no stipulation afterwards that the pauper was to be paid wages for fifty-one weeks, at the rate of 3*l.* 10*s.* for the whole year. I think, therefore, that there was no alteration of the original bargain, but that there was a dispensation with the service of the pauper for one week, and I think that the sessions were warranted in considering this either a case of dispensation or of fraud. I cannot distinguish this case from that of *The King v. Sulgrave*. (b) There the pauper was hired in *February* to serve till *Old*

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—
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against
The Inhabit-
ants of
MARKET Bos-
worth.

(a) Vol. i. 297.

(b) 2 T.R. 376.

1824.

THOMAS *against* PEARCE.Wednesday,
May 19th.

A RULE had been obtained by *Reader* to set aside the service of the copy of the bill of *Middlesex*, in this case, for irregularity. It appeared, that when the plaintiff served the defendant with the copy, he asked to see the original, when the plaintiff replied, that he had not got it with him, but that his attorney had it.

Where a defendant on being served with a copy of a writ, demands to see the original, and it is not shewn to him, the service is irregular, and will be set aside with costs.

Archbold shewed cause, and contended, that the plaintiff was not bound to shew the original, when he served the copy. The statutes 12 G.1. c.29. and 51 G.3. c.124. s.1. direct that, in certain cases, a copy shall be served, but do not require that the original proceess should at the same time be shewn. In *Worley v. Glover* (a) it was said, that the statute requiring service of a copy was the same as if it had said "deliver a copy;" and *Boswell v. Roberts* (b) was a similar decision.

Per Curiam. In *Edgar v. Farmer* (c) Lord *Hardwick* expressly states, that the service of the process was bad, because the defendant was not allowed to see the original, although he demanded it when served with the copy. That is perfectly consistent with *Worley v. Glover* and *Boswell v. Roberts*, for it does not appear, that in either of those cases the defendant desired to see the original; and unless he expresses such a desire, the other party is not bound to shew it. This point was very lately before

(a) 2 Str. 877. (b) *Barnes*, 422. (c) *Ca. temp Hardw.* 138.

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THOMAS
against
PEARCE.

the Court of Common Pleas, in the case of *Westley v. Jones (a)*, when they acted upon the opinion expressed by Lord *Hardwick* in *Edgar v. Farmer*, and set aside the service of the copy of process, the original not having been shewn, although demanded. The act of parliament does not say that the plaintiff "shall deliver a copy," but that he shall "serve the defendant personally with a copy." Where that is required the party has a right, if he wishes it, to see the original, in order that he may have reasonable proof that he is served with a correct copy of the process; the service in this case was, therefore, irregular, and must be set aside with costs.

Rule absolute.

(a) 5 B. M. 162.

Saturday,
May 22d.

ROBINSON *against* VALE.

The plaintiff in an action of trespass, having obtained a verdict, signed final judgment after the defendant had committed an act of bankruptcy, but before the issuing of a commission: Held, that the debt was proveable under a commission subsequently issued, and that the defendant, who had been arrested on a ca. sa., was entitled to be discharged on obtaining his certificate.

A RULE had been obtained to discharge the defendant out of custody, on the ground that he had obtained his certificate under a commission of bankruptcy, which issued after the contracting of the debt for which he was arrested. It appeared, that an action of trespass had been brought against him for taking the plaintiff's goods; the plaintiff obtained a verdict, and final judgment in that action was signed on the 29th of *January*. The defendant committed an act of bankruptcy on the 23d, and a commission was thereupon issued on the 31st of the same month. The defendant

was

was afterwards arrested, on a ca. sa., and having obtained his certificate, which was allowed on the 8th of *April*, made this application.

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against
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Wilde shewed cause, and contended, that the plaintiff's demand was not proveable under the commission, the damages and costs in an action of tort not being "a debt bonâ fide contracted," within the meaning of the 48 G.3. c.135. s.2., which enables creditors to prove such debts, when contracted between the act of bankruptcy and the issuing of the commission.

Per Curiam. The judgment, even in an action of tort, is a debt contracted. The words "bonâ fide" in the statute, appear to be used in opposition to debts contracted by collusion; and it seems to have been the object of the legislature, to prevent all discussion, as to whether a fair debt of any description was contracted before or after the act of bankruptcy. This debt was therefore proveable, and the defendant must be discharged.

Rule absolute.

and corporate, by the name of the bailiff and burgesses of the borough of *Ilchester*; and that the inhabitants of the borough were, by letters patent, granted by *Philip* and *Mary*, in the fifth and sixth years of their reign, incorporated by the name of bailiff and burgesses of the borough of *Ilchester*; and that the bailiff and burgesses have, from time whereof, &c. been seised and possessed of the guildhall, with its appurtenances, and have been used and accustomed thence hitherto to hold all corporate assemblies there, and to use the same for all corporate purposes; and that until the making of the said award the bailiff and burgesses had been, and were, lords of the manor, and had been used and accustomed to hold courts-leet in and for the manor, within the guildhall, and to have the exclusive use and enjoyment thereof. And that *Ph. & M.* did by their charter grant unto the said bailiff and burgesses to have within the said borough, for ever thereafter, view of frankpledge, of all the burgesses, inhabitants, and resiants, twice by the year, in the guildhall of the borough aforesaid, to be holden at such days and times as to them should seem fit and necessary, as of ancient time had been used. The return then set out a private act of parliament, and an award made in execution if it, whereby the arbitrator awarded to Lord *H.* “all that the manor of *Ilchester*, with the rights, members, courts, view of frankpledge, profits of tolls of all markets and fairs held in the borough of *Ilchester*, royalties and appurtenances to the same belonging, (excepting to the bailiff and burgesses, the guildhall, houses, buildings, court, or garden, belonging to the same, and the ground in front thereof inclosed with iron chains, &c.” The return then

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the exception in the award was merely intended to leave the property in the guildhall in the bailiff and burgesses, but not to disturb or destroy any right which the lord might have, to use it occasionally for the purpose of holding his courts.

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—
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Adam, contra. The lord of the manor of *Ilchester* has not any right to hold his court-leet in the guildhall of the borough. There is nothing on the face of the return to shew a custom to hold it there; nor is there any thing in the charter of *Ph.&M.* which makes it incumbent on the lord to hold his court there. The return states, that although the lord hath immemorially held a court-leet, yet that such court-leet of right ought not to be holden in the guildhall. [*Bayley J.* But it does not deny, that it has of right been holden there from time immemorial.] The bailiff and burgesses are alleged to have been lords of the manor from time whereof, &c., and the unity of possession of the manor and guildhall, gets rid of the presumption that the lord has, by custom, a right to hold his court there. Nor is the case altered by the charter of *Ph.&M.* It certainly, in words, grants a court-leet to be holden in the guildhall, but there is nothing in the charter to make the place of the essence of the court. Besides, as the charter does not confer any new privileges, it is to be considered rather as a charter of confirmation than of original grant; it cannot therefore be supposed, that the crown intended to impose the necessity of holding the court-leet in any other way than that which would have sufficed before. Of the cases which have been cited, *Rex v. Mayor of Wigan* is an authority in favor of this return, and *Rex v. Grantham* is not entitled to much weight, as it appears to have

gesses, and their successors, the guildhall, houses, build-
ings, court or garden belonging to the same, and the
ground in front thereof, now inclosed with iron chains ;
and also except the allotments hereinbefore made to
them, and also divers quit-rents, as in the award in that
behalf mentioned." The things excepted are all mat-
ters of property, and it is not inconsistent with the terms
of the exception, that the use of the guildhall for the
purpose of holding the court-leet should pass by the
granting part of the award. For these reasons, I am of
opinion, that the award conveyed to Lord *H.* not only
a right to hold a court-leet, but a right to hold it in the
guildhall of the borough of *Ilchester*. A peremptory
mandamus must therefore be awarded.

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against
The Bailiff, &c.
of ILCHESTER.

BAYLEY J. I am of opinion that the return is insuf-
ficient, and ought to be quashed. The bailiff and bur-
gesses might have given a very short answer to the
most material allegation in the writ, viz. that the court-
leet has not, from time immemorial, of right been holden
in the guildhall. The return, however, does not apply
to the time past, but merely to the present. I think,
that by omitting to deny the whole allegation, the cor-
poration have admitted that which obliges them to allow
the lord to use the guildhall for the purpose of holding
the court-leet there ; for they admit that the leet has
been always holden there, and set out a charter of
Ph.&M., granting to them a court-leet to be holden
in that place, as of ancient time had been used. The
lord of the manor then clearly had a privilege to hold
the court there, and I am inclined to think that he was
under an obligation to do so ; but it is not necessary to
decide that point. The exception in the award does
not

relied on does not affect the question. The guildhall appears to have been parcel of the demesnes of the manor, and unless excepted, would have passed to Lord *H.* together with the manor. That appears to have been the reason for introducing the exception; but even if it were not so, the court-leet having been granted with all privileges, the exception could not afterwards take them away.

1824.
 ———
 The King
 against
 The Bailiff, &c.
 of ILLONESTER.

Peremptory mandamus awarded:

The KING *against* The Justices of the Peace for
 the City and County of the City of YORK.

A RULE had been obtained calling upon the defendants to shew cause why a writ of mandamus should not issue, commanding them to cause continuances to their next general quarter sessions of the peace, to be holden in and for the said city and county, to be entered, upon the appeal of the overseers of the poor of the parish of *St. Cruz* in the said city, against a rate or assessment made by virtue of an order of the court of general quarter sessions of the peace, held for the said city and county, on *Friday*, the 17th day of *October* last, whereby the inhabitants of the parish of *St. Cruz* were assessed in the sum of 32*l.* 14*s.* 9*d.*, as their proportion of the sum by the court directed to be estreated on the inhabitants of the said city and county, and at such next general quarter sessions of the peace to hear and determine the merits of the said appeal. It appeared that a rate had been made, and imposed upon the respective parties within the city and county in

By 55 G.3.
 c, 51. an appeal
 is given against
 a county rate
 made in fixed
 proportions in-
 variably adopt-
 ed for a series
 of years.

statute, but still adhere to the scale of the fixed proportions. It follows, consequently, that the rate in question is unaffected by any of the clauses in that act. If that be so, the appeal can only lie by virtue of the 12 G.2. c.29., but that, the case cited expressly negatives. The inconvenience of a contrary construction would be, that the justices might be compelled at any time, and with whatever inconvenience, to make a new county rate under the 55 G.3. c.51, although by the first section of that act they are expressly invested with a discretionary power. No injustice can arise from holding that an appeal is not given, because the party aggrieved may still apply for a mandamus to the justices to make a new ad valorem county rate under the last-named statute, which, indeed, is the proper sort of relief in a case like the present.

1824.

The King
against
The Justices of
York.

Coltman and *Alexander* contra. It is true, that the case of *Rex v. St. Paul's Covent Garden* determined that no appeal lay under the 12 G.2. c.29. against a rate founded on the fixed proportions then existing; but an appeal lies under the 55 G.3. c.51. s.14. That act was of a remedial nature, as appears from the first section, which recites that the laws then in force were found ineffectual for the correction of the disproportions which then existed, or might from time to time take place in the assessment of county rates, and, therefore, empowers the justices in sessions, "whenever circumstances shall appear to require it," to make a fair and equal county rate. But how can the necessity for a new rate appear to the justices in sessions, except by appeals against the disproportions of those then existing? The fourteenth section gives an appeal, in as full and comprehensive

1824.

The KING *against* The Inhabitants of BENNE-
WORTH.

Monday,
May 31st.

UPON appeal against an order of two justices, where-
by *James Fletcher*, his wife and family, were removed
from the parish of *Benneworth*, in the parts of *Lindsey*
and county of *Lincoln*, to the parish of *Calcethorpe* in
the said parts and county; the sessions quashed the
order, subject to the opinion of this Court on the
following case:

In 1803, the pauper, *James Fletcher* (then a married
man) was hired by yearly hiring as a confined labourer
in husbandry with Mr. *Day* of *Calcethorpe*, farmer.
The pauper had, according to agreement, a house and
garden, and a rood of potatoe land, and the keep of a
cow on his master's land. The cow was instead of so
much money for wages. The pauper remained in Mr.
Day's service eleven years, during which time, namely,
in the year 1813, the pauper's cow failed in milk, on
which account, through the kindness of his master, and
not in consequence of *any bargain*, the pauper had in
the place of the former cow, two heifers kept for him by
his master on his master's land for about eleven months.
The potatoe land and keep of the two heifers were to-
gether of the value of 10*l.* per annum and upwards.
But the potatoe land and keep of one cow were below
that value. On leaving Mr. *Day*, the pauper went to
live as a confined labourer with Mr. *Briggs* at *Scamblesby*,

A pauper was
hired for a year,
and had by
agreement a
house and gar-
den, a rood of
potatoe land,
and the keep of
a cow on his
master's land.
After the pau-
per had served
ten years, his
cow failing in
milk, the pau-
per had in lieu
of the cow two
heifers kept for
him, through
the kindness
of his master,
and not in con-
sequence of
any bargain.
The potatoe
land and the
keep of two
heifers was of
the annual
value of 10*l.*,
but the potatoe
land and the
keep of the one
cow was of less
annual value
than 10*l.* :
Held, that the
pauper, by hav-
ing the potatoe
land and the
keep of the two
heifers, *before*
the passing of
the stat. 59 G.3.
c.50., gained a
settlement :
but, *semble*,

that by having the potatoe land and the keep of the two heifers after the passing of the
59 G.3. c.50., he would not have gained a settlement.

sidered the pauper as having the tenement under an agreement, which made him tenant at will. So in *Rex v. Lackenheath* (a), the schoolmaster was considered as tenant at will; and in *Rex v. Croft* (b) the sessions inferred a contract. Now, in this case the pauper acquired the right to feed the two heifers merely by the permission of his master, and not by virtue of any contract. No settlement was therefore gained in the parish of *Calcethorpe*.

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—
The King
against
The Inhabit-
ants of
BENNEWORTH.

The *Attorney-General*, *Nolan*,* and *Fynes Clinton*, contra. It is clear upon the authorities, that where the run of a cow upon land is of the annual value of 10*l.*, and it is hired by the year, a party thereby gains a settlement. If he pays in labour instead of money, he also gains a settlement. The value of the run of one cow not being of the annual value of 10*l.*, the pauper did not thereby gain any settlement, but the master afterwards gave him the run of two heifers, and that was of the annual value of 10*l.* Suppose, in the first instance, the pauper had had land of the annual value of 9*l.*, as an equivalent for his service he would not have gained any settlement; but if the master afterwards, for his own convenience, gave the pauper other land worth 10*l.* a year, that surely would give a settlement, although he did not occupy that land under a contract. That is the case here, for the two heifers are substituted for one cow. If, therefore, the run of a cow be equivalent to the occupation of a tenement, it is clear that a settlement was gained. Suppose, that instead of service he had paid a money rent for the first tenement, and that

(a) 1 *B. & C.* 531.(b) 3 *B. & A.* 171.

in *Calcethorpe*, and that the present rule must be made absolute. The inconvenience is retrospective only: the law, so far as it regards a case of this kind being altered by the statute 59G.3. c.50. So that no person need now abstain from such an act as is disclosed in this case, through the fear of bringing a burthen upon his parish.

Order of sessions quashed.

1824.

The King
Against
The Inhabit-
ants of
BENKSWORTH.

DOE on the Demise of P. THOMAS and FRANCES
MARY his Wife against ACKLAM.

Monday,
May 31st.

EJECTMENT, to recover certain premises in *Kings-
ton-upon-Hull*. The demise was on the 1st of
November, 1821. At the trial before *Abbott C. J.*, at the
York Summer assizes, 1822, the jury found a special
verdict, the material parts of which were as follows:

Elizabeth Harrison, A.D. 1813, became seised in her
demesne, as of fee, of and in a certain part of the tene-
ments in the declaration mentioned; and afterwards,
and between that year and 1818, *E. Harrison* became
seised in her demesne, as of fee, of and in the residue
of the tenements in the declaration mentioned; and
being so seised thereof, she afterwards, on the 26th day
of *November*, 1818, at, &c., died so seised of the said
tenements, never having been married, and not having
made any last will or testament. At the time of the
death of *Elizabeth Harrison*, *Frances Mary*, the wife
of *Philip Thomas* was and still is her next heir, if
she the said *Frances Mary* can by law inherit the
said tenements from *Elizabeth Harrison*; and *Peter
Harrison* was, during his lifetime, the uncle of *E. Har-*

Children born
in the United
States of Ame-
rica since the
recognition of
their independ-
ence, of parents
born there be-
fore that time,
and continuing
to reside there
afterwards, are
aliens, and can-
not inherit
lands in this
country.

P. Thomas, in the year 1807. The colonies of *Connecticut*, *Rhode Island*, and *New York*, with other colonies in *North America*, separated themselves from the government and crown of *Great Britain*, and united themselves together, and on the 4th day of *July*, 1776, declared themselves free and independent states, by the name and style of the United States of *America*. On the 3d day of *September*, 1783, his late majesty acknowledged the United States of *America* to be free, sovereign, and independent states, and on the same 3d day of *September*, a definitive treaty of peace was signed, between his said majesty and the United States of *America*, which treaty is as follows :

Article 1st. His *Britannic* Majesty acknowledges the said United States, viz. *New Hampshire*, *Massachusetts's Bay*, *Rhode Island*, and *Providence Plantations*; *Connecticut*, *New York*, *New Jersey*, *Pennsylvania*, *Delaware*, *Maryland*, *Virginia*, *North Carolina*, *South Carolina*, and *Georgia*, to be free, sovereign, and independent states; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the government, proprietary, and territorial rights of the same, and every part thereof.

Article 3d. It is agreed, that the people of the United States shall continue to enjoy, unmolested the right to take fish of every kind on the grand bank, and on all the other banks of *Newfoundland*, also in Gulf of *St. Lawrence*, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind, on such part of the coast of *Newfoundland*, as *British* fishermen shall use, but not dry or cure the same on that island;

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THOMAS
against
ACKLAM.

ciliation which on the return of the blessings of peace should universally prevail; and that congress shall also earnestly recommend to the several states, that the estates, rights, and properties of such last-mentioned persons shall be restored to them, they refunding to any persons who may be now in possession, the bonâ fide price (where any has been given) which such persons may have paid, on purchasing any of the said lands, rights, or properties since the confiscation; and it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment to the prosecution of their just rights.

Article 6th. That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall on that account suffer any future loss or damage either in his person, liberty, or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in *America*, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

Article 7th. There shall be a firm and perpetual peace between his *Britannic* Majesty and the said states, and between the subjects of the one and the citizens of the other, wherefore all hostilities both by sea and land shall from henceforth cease, prisoners on both sides shall be set at liberty; and his *Britannic* Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes, or other property of the *American* inhabitants, withdraw all his armies, garrisons and fleets from the said United States, and from every

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THOMAS
against
ACCLAM,

pendence, did not in any manner affect the character and capacity of those persons who had been born within the colonies before such separation, as natural born subjects of this kingdom; but that they continued capable to inherit and hold lands in *Great Britain* as before.

3d. That by virtue of the 25 *Ed.3.*, or the 7 *Ann. c.5.*, explained by 4 *G.2. c.21.*, persons born within the United States of *America*, since their independence has been acknowledged, have the same right to inherit and hold lands as their parents who were born before that time.

The first proposition is so clear, that it is rather to be assumed than to be argued: (this was conceded on the other side.) Then *James Ludlow* the father, and *Elizabeth Harrison* the mother of Mrs. *Thomas*, were natural born subjects of *Great Britain*, able to purchase, hold, inherit, and transmit lands.

The question upon the second proposition is, simply, whether persons born in the colonies before the separation did, in consequence of the separation, become aliens, and thereby incapable to hold or inherit lands in *Great Britain*; for alienage is the only incapacity now in question. That they did not become aliens, will be made clear by the arguments arising from the situation of the parties at the time when the independence of the colonies was acknowledged; secondly, by the language of the treaty containing that acknowledgment, subsequent treaties and various acts of parliament sanctioning those treaties; and, lastly, by authorities in the books. And here it may be observed, that the affirmative of alienage lies on the other side. Mr. *Ludlow* was a natural born subject, it is sufficient for the plaintiff to shew that he was *natus ad fidem regis*, it is for the defendant

to

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if they cannot of their own accord put off their allegiance, and if cession by the crown cannot have that effect, it would be singular if they could be rendered aliens by the violent act of a third power. This point will be made more clear by considering hereafter the history of the possessions which the crown of *England* formerly enjoyed, lying on the continent of *Europe*. But it will be contended, that where a colony renounces its obedience and separates itself from the parent state, by which its independence it afterwards acknowledged, there the allegiance is at an end. There is not, however, any authority for that position, it must be rested on general principles, and be established by arguments *ab inconvenienti*; such as the difficulty of owing a double allegiance, and the necessity of contending that all the *Americans* will be traitors who at any future time may carry arms against this country. As to the first, *Calvin's case* (a) shews that a double allegiance may be due, a man may be "*ad fidem utriusque regis*," and there are many instances of such an allegiance put in 1 *Hale's P.C.* 68. As to the other it is sufficient to answer, that it cannot affect the question of law, for if inconveniences necessarily follow out of the law, only the parliament can cure them, dict. per *Vaughan C. J.* in *Craw v. Ramsay*. (b) The situation of the parties at the time when the separation of the colonies took place, shews then that the *Americans* were not thereby rendered aliens, and the same appears by the several treaties made with them, and the acts of parliament by which those treaties were recognized. The first article of the original treaty simply declares the *United States* free and independent.

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DOX dem.
THOMAS
against
ACKLAM.

(a) 7 Co. 1.

(b) *Vaugh.* 974.

It

place of the birth is not conclusive as to alienage. Lord *Coke*, in his commentary on that passage (a) says, "Note here, *Littleton* saith not *hors del realme* but *hors de legiance*, for he may be born out of the realm of *England* yet within the legiance." This shews that Mr. *Ludlow* and his wife were natural born subjects, and that character, once acquired, is indelible; no authority save an act of parliament is sufficient to destroy it, for that alone can naturalise one born an alien. In *Calvin's* case (b) a difficulty was put as possible in the event of a separation of the crowns of *England* and *Scotland*; but Lord *Coke* says, "albeit the kingdoms should, by descent, be divided and governed by several kings, yet it was resolved that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural born subjects, and no aliens, for that naturalization due and vested by birth-right cannot, by any separation of the crowns afterwards, be taken away; nor he that was by judgement of law a natural subject at time of his birth become an alien by such a matter *ex post facto*." The case of the provinces of *Gascoyne*, *Guienne*, *Anjou*, is decisive to shew that the subjects of them were natural subjects, for the purpose of inheritance, not only during the time when they formed a part of the dominions of the crown, but afterwards when they were conquered by France. Those provinces came to *H. 2.* by different titles. They were all lost in the reign of king *John*, and many of the principal persons in them adhered to the *French* king. The *English* estates of those persons were confiscated, but the people in general were still inheritable of lands in

1824.

DOR dem.
THOMAS
against
ACKLAM.

(a) *Co. Lit.* 129. a.(b) 7 *Co.* 54.

but the Lord Ordinary held, that the claimant having been born before the revolt of the colonies was to be considered as a subject of *Great Britain*, residing then in a foreign country. *Gordon and Scott v. Brown*, (decided in 1810, but not reported,) is also in point: in that case *Brown*, the son and heir of the person last enfeoffed, was born in *America*, after 1783, and was held entitled to the land. In *Shedden v. Patrick* (a) the same point was involved, but the court of session appeared to entertain no doubt about it, the whole question there turned upon the illegitimacy of the claimant. Applying to this case the observation of Lord *Hale*, in *Collingwood v. Pace* (b), "The law of *England*, which is the only ground, and must be the only measure, of the incapacity of an alien, and of those consequential results that arise from it, hath been always very gentle in the construction of the disability, and rather contracting it than extending it so severely," the Court will be fully justified in giving such a construction to those statutes, and to the doctrine of alienage in general, as will support the claim of the present lessors of the plaintiff.

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 Dox. dem.
 Thomas
 against
 Ackland.

Parke, for the defendant. *Mrs. Thomas*, the lessor of the plaintiff, was not a natural born subject, and therefore cannot be entitled to the lands in question. In *Calvin's* case it is said, that there are three incidents to a subject born; first, that the parents be under the actual obedience of the king; second, that the place of his birth be within the king's dominion; and thirdly, at the time of his birth, the kingdom where he is born must be under the legiance of the king. The first two of these incidents shew, that at common law *Mrs. T.*

(a) *Morrison's Dict. of Decisions*.

(b) 1 *Ventr.* 427.

is a complete renunciation of all authority on the part of the crown of *Great Britain*; on the side of the colonies a claim of freedom from allegiance. Mr. *Ludlow*, by remaining in *America* after the treaty, lost his character of a *British* subject. This was urged by Lord *Redesdale*, when arguing the case of *Somerville v. Somerville (a)*, and was not denied, either by the counsel on the other side or by the court. The subsequent provision giving to the *Americans* a qualified right of fishing, proves that it was so understood; for had they remained subjects of the King of *Great Britain*, that clause would have been unnecessary. The clauses for the restoration of property are merely exceptions from that which would otherwise have followed from the first article, and do not treat the *Americans* and their heirs as capable of holding lands in the character of natural born subjects. The consequence of deciding for the plaintiff would be, that all *Americans* must be considered as subjects, with all their privileges and duties. There may be instances in which persons may be entangled in a double allegiance; but the inconvenience is so great, that the Court will not be inclined to favour the doctrine of a double allegiance. The case supposed in *Calvin's case*, of a separation of the crowns of *England* and *Scotland*, is a separation by operation of law, without any dissolution of the compact by the consent of the parties. This case has already been decided in the *American* courts, where it has been held, that the natives of *Great Britain* are aliens, and incapable of inheriting lands in that country. *Blight's Lessee v. Rochester. (b)*

Cur. adv. vult.

(a) 5 *Vez.* 781.

(b) 7 *Wheaton's Reports of Cases in the Supreme Court of the United States*, 535.

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DOX dem.
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against
ACKLAN

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Doc dem.
Thomas
against
Austen.

titled to be deemed a natural born subject, unless the father be, at the time of the birth of the child, not a subject only, but a subject by birth. The two characters of subject and subject by birth, must unite in the father. *James Ludlow*, the father of *Frances Mary*, was undoubtedly born a subject of the crown of *Great Britain*; he was born in a part of *America* which was at the time of his birth a *British* colony, and parcel of the dominions of the crown of *Great Britain*; but upon the facts found, we are of opinion, that he was not a subject of the crown of *Great Britain*, at the time of the birth of his daughter. She was born after the independence of the colonies was recognised by the crown of *Great Britain*; after the colonies had become united states, and their inhabitants generally citizens of those states; and her father, by his continued residence in those states, manifestly became a citizen of them. This recognition of independence was made, or rather confirmed, on the 3d of *September*, 1783, by a treaty between his late majesty and the United States of *America*. Preliminary articles, which are afterwards introduced into, and form this treaty, were signed on the 30th *November* 1782, after the passing of the statute 22 G.3. c.46., whereby his majesty was authorised to treat of and conclude a peace or truce with the several *American* colonies therein named. Between the signing of the articles and of the definitive treaty, several acts were passed, mentioning the United States of *America*, and the subjects and citizens of those states: and the name of colonies or plantations is no longer used. (See 23 G.3. c.26., c.39&80.) Many acts of parliament, wherein the United States of *America* are mentioned and treated as a distinct and independent nation, have been since passed; so, that if

on certain coasts. On the part of the defendant it was said, that if they were to be considered as *British* subjects, they would have this privilege in that character. At all events it is clear, that a liberty thus specially given confers no right beyond that which is so given.

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against
ACKLAND.

By the fifth article it is agreed, that congress shall recommend to the legislatures of the respective states to provide for the restitution of confiscated estates belonging to real *British* subjects, &c., that persons of every description shall have liberty to go into any part of the United States, and remain twelve months, to endeavour to obtain restitution of their estates. The sixth article provides against future confiscations, by reason of the part that any person may have taken in the war. Now it is impossible to extend the effect of these two articles beyond the particular lands that might be restored, recovered, or retained in virtue of them; and their effect, even as to such lands, with the future residence of their owners, and the rights of descent are not clearly defined. Then, as to the subsequent treaty; it provides only that *British* subjects who then held lands in the territory of the United States, and *American* citizens, who then held lands in the dominions of his majesty, should continue to hold them, and might grant, sell, or devise them, as if they were natives, and that neither they nor their heirs or assigns should, so far as might respect the said lands, and the legal remedies incident thereto, be considered as aliens. This article is therefore, in terms, confined to lands *then held*; in its general import, it distinguishes *British* subjects from *American* citizens; and the provision that persons should not be considered as aliens, with regard to particular lands, seems to indicate very plainly, that they were considered as aliens with

served. That rule expired on the 10th *May*. On that day, a summons for time to plead was served, returnable at three o'clock, on the 11th. Before that [time the plaintiff's attorney signed judgment. *Campbell* obtained a rule to set it aside, on the ground that it was signed too soon, according to the rule laid down in *Tidd's Practice*. "If a declaration be delivered or filed, with notice to (a) plead within the first four days of term, the defendant has all the morning of the fifth day to plead, and judgment cannot be signed for want of a plea, till the opening of the office in the afternoon of that day. But in any other part of the term, if the defendant do not plead within the four days, the plaintiff may sign judgment in the morning of the fifth day. *Shepherd v. Mackreth*. (b)"

1824.

 DUNCAN
against
CARLTON.

Patteson shewed cause, and contended, that the rule there laid down could not be correct. No reason is given why a different rule should prevail as to essoign declarations and others. The practice of the Common Pleas is clearly to allow the same time for pleading in all cases; and it is more convenient that it should be so, for different rules of practice, where there is no reason for them, can only lead to confusion.

Per Curiam (after consulting the Master.) The practice in this court has for a long time continued, according to the rule given in *Tidd's Practice*; and although the rule in Common Pleas may be different, we think it better to abide by that which is known in this court.

Rule absolute.

(a) 1 *V.* 470., 8th edit.(b) *K. B. E. T.* 55 *G. 3.*, MS.

1824.

KENNARD *against* HARRIS.

BY an order of nisi prius this cause was referred to an arbitrator, and among other things it was directed that the costs of the reference and award should be paid by the defendant. The arbitrator made his award on the 13th of *November* 1123. The plaintiff obtained a rule nisi for setting it aside. It now appeared by the affidavit of the defendant's attorney that the costs of the reference and award had been taxed and paid to, and accepted by, the plaintiff, on the 23d *January* 1824, before he had moved to set aside the award.

A party, after receiving the costs of reference and award, which by the terms of a rule of reference were to be paid by the other party, cannot move to set aside the award.

Gaselee was now heard against the rule, and *E. Larves* contra.

Per Curiam. The plaintiff, after accepting the costs of the reference and award, is precluded from moving to set it aside. If no award had been made, no costs would have been due; by accepting the costs of the award he admits the award to be valid, and cannot now say that it is bad.

Rule discharged.

1824.

REMMINGTON *against* JOHNSON.

D. F. JONES had obtained a rule to shew cause why the interlocutory judgment and subsequent proceedings should not be set aside with costs, and why the plaintiff or his attorney should not pay the costs of the application, on the ground that the plaintiff had signed interlocutory judgment, for want of a plea, without having demanded a plea.

A demand of a plea is necessary before signing judgment, except where defendant is in custody of the sheriff, and plaintiff has declared against him as being in that custody.

Platt now shewed cause on an affidavit, stating, that the defendant, at the time of the commencement of the present action, and down to the present time, was in the custody of the sheriff of the county of *Huntingdon*, in another suit; and he cited *Rose v. Christfield* (a), *Wilkinson v. Brown* (b), as establishing, that no demand of a plea is necessary, where the defendant is in custody of a sheriff, whether in the same or in another suit.

D. F. Jones, in support of the rule, contended, that as a general rule, the plaintiff could not sign judgment for want of a plea, without first demanding a plea; and that even supposing the exception of cases of defendants in custody of the sheriff, not to be confined to instances of defendants being in the custody of the sheriff in the same suit, but to extend to instances of the custody of the sheriff in another suit, still the exception could only apply to cases where the plaintiff had declared against

(a) 1 T. R. 591.

(b) 6 T. R. 524.

obtain as to the time of bringing forward the application, and that the plaintiff might not have the means of seeing that the documents in support of the application were sufficient, according to the requisites of the act; and he cited *Ex parte Nielson (a)* and *Magnay v. Gilkes (b)*, as being expressly in point.

1824.

 DAVIES
 against
 ROGERS.

The Court, however, after referring to the officers, said, that although the practice was otherwise in the Common Pleas; yet in this court, after notice, the rule was absolute in the first instance.

D. F. Jones then took a formal objection, arising on the face of the defendant's own affidavits, whereupon the motion was refused.

(a) 7 Taunt. 37.

(b) 7 Taunt. 467.

SIMONDS and LODER *against* WHITE.Monday,
May 31st.

ASSUMPSIT for 106*l.* 3*s.* 6*d.*, as money paid by the plaintiffs to the use of the defendant. At the trial before *Abbott C. J.*, at the *London* sittings after *Hilary* term, 1823, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:

The plaintiffs are *British* subjects, having a mercantile establishment in *London* where *Simonds* resides, and at *Saint Petersburg* where *Loder* resides, under the permission of the *Russian* government. The defendant is also a *British* subject, and the owner of the *British* ship *Mamhull*, which was chartered at *Gibraltar* on the 15th

A loss by general average is to be calculated between owner of ship and the owner of goods according to the law of the port of discharge.

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~~White~~
Simonds
against
White.

lading. When the vessel arrived at *Saint Petersburg*, a statement of general average on the voyage, according to the *Russian* laws upon that subject, was made up and settled by an officer appointed for that purpose by the *Russian* government, called the *Dispacheur*. In that statement was included as a charge upon the cargo for general average, the sum of 106*l.* 3*s.* 6*d.* for the cost of the new cable beyond the old one, surveying the old cable, weighing and getting the new cable on board, the duty payable on the foreign cable when brought into *England*, and the new cable's proportion of the above charges, which are admitted to be general average according to the laws of *Russia*; and the plaintiffs were called upon to contribute to general average so calculated, and by the laws of *Russia* they were obliged to pay the sum demanded in order to get possession of the cargo. The cargo of the *Mamhull* was insured by a policy effected in *London*, the underwriters upon which refused to allow the cable and the charges connected with it as part of the loss. On the 21st of *February*, 1821, the plaintiff, *Simonds*, wrote a letter to the defendant demanding payment of the said sum of 106*l.* 3*s.* 6*d.* The case was argued in the last term, by

F. Pollock for the plaintiff. The general average ought to have been calculated according to the laws of *England* and not according to the laws of *Russia*, and the defendant having claimed and received the money on grounds not tenable, and the plaintiffs having been compelled to pay it in order to obtain their goods, the sum so paid may be recovered back in an action for money had and received. The question is to be decided on the same principle as if the defendant was now

come due, is implied by the general law merchant. In that case too, the question arose between the underwriter and the owner of the goods; in the present, it arises between the owner of the ship and the consignee of the goods, and the rights and liabilities of the one are very different from the rights and liabilities of the other. In that case it was not stated, that the average was settled according to the law of the place where the adjustment was made; in the present case it is so stated. Now it is quite clear, that by the general law and custom of merchants, as appears by the most celebrated works on marine law of this and other countries, that the master of a ship has a lien upon the goods at the port of discharge for any average which may become due during the voyage. *Consulat de la mer*, Paris edition, 1808, section 225. *Complete Body of Sea Laws*, section 33. article 31. *Wellwood's Abridgement of Sea Laws*, edition 1613, tit. 21. page 47. *Bynkershoek Quaestiones juris Privati*, liber 4. c. 24. *Malyne's Lex Mercatoria*, 3d edition, page 113. *Beawes's Lex Mercatoria*, edition 1813, tit. *Average*, p. 245. *Ordinance of Lewis the Fourteenth*, book 3. tit. 8. *Du Jet*. article 21. *Abbott on Shipping*, 257. The parties, therefore, in this case, must be supposed to have contracted upon this understanding. And if the master has a lien at the port of discharge, it seems to follow as a necessary consequence, that the average must be calculated and adjusted according to the law which prevails there, for it would be absurd to suppose that he can have a lien at the port of discharge for average which is to be calculated according to the law of another country. In this case the bill of lading mentions that the vessel is bound to *Petersburgh*, and it was therefore known to

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against
WHITE.

the ship-owner, and it is an admitted fact that the average was adjusted according to the law of *Russia*.

The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract, as between the parties to the contract: but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle. But in one point all agree; namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo. I believe also, that all are agreed on another point; namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them, shall be either paid or secured to his satisfaction. This appears by the case to be the law of *Russia*. This power is noticed in the civil law, *Dig. lib. 14. tit. 2. 2.* It is expressly given in the *Consulat, c. 98.*, recognised by *Cleirac* in his commentary on the *Jugemens d'Oleron*, p. 35., and allowed by the *French Ordinance of Marine*, tit. *Du Jet.* art. 21. If then the average is to be adjusted at the place of destination, by what law shall it be adjusted?

One may suppose the case of a *British* ship carrying to a foreign port the goods of *British* subjects only, and

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or rule of the *English* law. The shipper of goods, tacitly, if not expressly, assents to general average, as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average, he must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us, to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made. I am to be understood as speaking of a case depending upon general rules and reason, and not upon a special or particular contract. It is of infinite importance to maritime commerce, that its regulations should be as simple and as few in number as general justice will permit. The wisest and most equitable rules may occasionally, in a particular case, be productive of an inconvenience, but such occasional and particular inconvenience is a much less evil, than the confusion and uncertainty that never fail to accompany a multiplicity of minute regulations. For these reasons we are of opinion that the defendant is entitled to our judgment.

Judgment for the defendant.

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against
WHITE.

after the certificate was granted, and that the pauper *George* was the son of the lastmentioned *Thomas*.

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—
The King
against
The Inhabit-
ants of
Catesby.

Reader, Marriott, and Ellis in support of the order of sessions. This is a good certifiante, although it was signed by only one churchwarden and one overseer. The 8&9 *W.3. c. 30. s. 1.* certainly requires the certificate to be signed by a majority of the churchwàrdens and overseers for the time being. But this certificate has been submitted to by the parish of *Catesby* for sixty years : every intendment, therefore, ought to be made in favor of it. *Rex v. Hinckley.* (a) By custom there may be only one churchwarden in a parish. *Rex v. Earl Shilton.* (b) Two overseers may have been appointed originally ; one of those may have died, and the certificate may have been signed at a time when there was one overseer only, and if that were so, it was signed by a majority of the churchwardens and overseers, as required by the statute. This is distinguishable from *Rex v. Clifton* (c), because it was proved that only one overseer had been appointed for the township for that year, and that appointment was clearly bad. It lay upon the other side to shew by evidence that only one overseer was originally appointed in this case.

Holbech and Adams contra. The certificate being dated so far back as 1761, no evidence could be given to shew the state of the parish at that time. *Rex v. Hinckley* only establishes that a reasonable intendment may be made to support such an instrument. Now in order to support this certificate, it must be intended,

(a) 12 *East*, 361. (b) 1 *B. & A.* 275. (c) 2 *East*, 168.

first,

wardens and overseers, or *the major part of them*. Both these acts require the concurrence of the churchwardens and overseers, or the greater part of them. The decisions, therefore, which have taken place upon the 43 *Eliz.* s. 5. with respect to binding out poor apprentices are applicable to cases arising upon certificates under the 8 & 9 *W. 3. c. 30. s. 1.* In *Rex v. Hinckley (a)*, an objection was taken to a parish indenture that it was signed only by one churchwarden and one overseer. The Court, however, held, that if by any intendment of law the indenture could be good, that intendment ought to be made, and they did intend that as, by custom, there might be only one churchwarden in a place, there were only one churchwarden and two existing overseers at the time when the indenture was executed, and therefore that the two who did execute, were a majority sufficient to bind the apprentice. Generally speaking, there ought to be two churchwardens in every parish; but by custom there may be one. By law, two overseers must be originally appointed; but the two overseers so appointed, may by death have been reduced to one, and in that case one overseer and one churchwarden would constitute the major part of the persons originally appointed. I think, therefore, that in this case, we may intend that at the time when this certificate was granted, *Webb* was the surviving overseer of two who had been originally appointed. This case differs from that of *Rex v. St. Margaret's, Leicester (b)*, because there it was stated as a fact in the case, that one overseer only had been originally appointed. So in *Rex v. Clifton (c)*, it was found that at the time of

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CATEBY.

(a) 12 *East*, 361.(c) 8 *East*, 332.(c) 2 *East*, 168.

granting

in favor of what is stated on the face of the certificate. If upon the trial of an issue, whether *Webb* was an overseer of the parish of *Catesby* or not, it had been proved that he was the only person appointed to the office of overseer for that year, the jury must have found that he was not an overseer at all, because the law requires that there should not be less than two overseers originally appointed. The certificate, therefore, would have been bad, notwithstanding the length of time during which it had been submitted to by the parish. I am of opinion, that in favor of what appears on the face of the certificate, the justices were well warranted in drawing the inferences that two overseers had been originally appointed, and that one had died before the certificate was granted. The authorities cited in the argument fully establish that every intendment ought to be made in favor of the certificate; but independently of those authorities, I think, that upon established principles, the sessions have drawn the proper conclusion.

LITLEDALE J. It appears on the face of the certificate that it was granted by only one churchwarden and one overseer. Now that is not sufficient, unless the law warrants the intendment of some facts, by means of which one churchwarden and one overseer may at that time have been the majority of the churchwardens and overseers. Now, by custom, there may be only one churchwarden, and therefore in this case, we may presume that one only was appointed. The appointment of one overseer would be illegal, and therefore we must intend that two were originally appointed, and that one of them had died before the certificate was granted, and that no other had been then appointed in his stead; and if we may intend.

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ants of
CATESBY.

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WILLOUGHBY *against* BACKHOUSE and MARSHALL.

CASE for an excessive distress. Plea, not guilty.

At the trial before *Bosanquet* Serjt., at the last summer assizes for *Buckinghamshire*, the following facts appeared in evidence: The plaintiff occupied a farm belonging to the defendant, *Backhouse*, and on the 26th of *September* 1822, the other defendant *Marshall*, as agent for *Backhouse*, distrained for 175*l.* which was then due for rent, and seized all the live and dead stock on the farm, and the household furniture, goods, and chattels on the premises, to the value of 1000*l.* On the same day the plaintiff executed the following agreement.

Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized.

“To Mr. *T. Marshall*. You having, as the agent of *T. J. Backhouse*, Esquire, this day entered a distress on my effects, at *Haverfield Lodge* for the sum of 175*l.* rent, which you claim to be due from me to the said *T. J. Backhouse*, at *Lady-day* last, I hereby authorise and empower you to hold possession of the same effects until the 15th day of *October* next, or until such other period subsequent to the expiration of the five days mentioned in your notice of distress as you may think proper; and I also authorise and empower you to convert the same effects into money, by the sale and disposition thereof, either by public sale or private contract, and at such time as you may think expedient. And I authorise you to dispense with the form of appraisement required by law in the case of a sale under a distress for rent, and to make such public or private sale with-

judge was not correct in point of law, for that the agreement was not any waiver of the right of action created by the wrongful seizure of the property.

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WILLOUGHBY
against
BACHMANN.

Storks and *Dover* now shewed cause, and contended, that it must be taken upon that agreement, together with the other circumstances proved respecting the actual sale of the property, that the plaintiff was a party to the whole transaction; that he ratified the whole ab initio and therefore could not afterwards complain that it was wrongful. If so, the verdict found under the direction of the learned judge was right.

Cooper contra, was stopped by the court.

BAYLEY J. This is a very plain case. When a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it. Now, here the rent in arrear, at the time of the first distress was 175*l.*, and the goods seized were worth 1000*l.*, the distress, therefore, was clearly excessive, and upon the seizure being made a right of action was vested in the plaintiff. Was that right of action destroyed by the agreement made afterwards? It gives no satisfaction to the tenant, he makes no stipulation not to sue for that which had been done. The landlord, indeed, has further power given to him, but I do not find that the tenant receives any thing. Such a document is no answer to such an action as the present. I think, therefore that the question was not properly

cient. The learned judge reserved the point, and the plaintiff having recovered a verdict, *Brougham*, in *Michaelmas* term, obtained a rule to enter a nonsuit.

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—
THORNTON
against
ILLINGWORTH;

J. Williams now shewed cause. The point now presented to the Court is new, and has not been touched upon in any case to be found in the books. Now it cannot be doubted, that a person may, by an express promise made after he is of age, bind himself to pay debts contracted during his infancy; and the only question is, whether the promise proved in this case was made in time to support the action. This may be likened to cases upon the statute of limitations, in which a new promise is necessary in order to render a man liable to pay an old debt, yet in such cases a promise made after the commencement of the action is sufficient. *Yea v. Fouraker.* (a)

Brougham and *Starkie* contra were stopped by the Court:

BAYLEY J. There is this distinction between the case cited and the present. There the debt continued from the time when it was contracted, but without the new promise it could not have been recovered, the defendant relying on the protection given by the statute of limitations. The ground on which that statute proceeds is, that after a certain time it shall be presumed that a debt has been discharged. A new promise rebuts that presumption, and then the plaintiff recovers, not on the ground

(a) 2 *Burr*, 1099.

which the action could rest. The new promise was the sole ground of action, and not the revival of an old one.

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THENTON
against
ILMANEWORTH.

LITTLEDALE J. When the statute of limitations is relied upon, an acknowledgement admits the perpetual existence of the debt, and therefore it suffices whether it is made before or after the bringing of the action. But the contract of an infant, under such circumstances as the present, being void and not voidable, the promise in this case did not prove that any legal cause of action existed at the time when the action was commenced. The rule for entering a nonsuit must therefore be made absolute.

Rule absolute.

RICHARDSON and Another *against* WALKER.

THIS was an action upon the case, brought pursuant to an order made by the Vice-Chancellor. The declaration stated, that the plaintiffs had been and then were lawfully possessed of a certain mill, with the appurtenances, within the manor or lordship and town of *Selby*, in the county of *York*, and by reason thereof were entitled to have the toll of all the corn and grain ground at their mill: "that all the tenants, resiants, inhabitants, and dwellers of and within the manor or lordship and town aforesaid, during all the term of the plaintiffs' possession of the said mill ought to have ground, and still of right ought to grind

A custom which binds the tenants and resiants within a manor to grind at the lord's mill "all their corn and grain which they use ground in their dwellings," does not prevent them from buying and using in their dwellings flour produced from corn ground at other mills.

persons, used and expended in their respective messu-
ages or dwelling-houses, to wit, &c., whereby the tenants,
resiants, inhabitants, and dwellers of and within the
manor, &c., did supply themselves, from such exposing
to sale and selling as aforesaid by the defendant, with
divers large quantities of corn and grain in a ground
state, to be expended and consumed in their dwelling-
houses, which but for such exposing to sale, and selling
ground by defendant as aforesaid, they would have
ground or caused to be ground, or would have pur-
chased when ground at the mill of the plaintiffs. Plea,
not guilty. At the trial before *Bayley J.*, at the *York
Lent* assizes, 1820, the jury found a verdict for the
plaintiff, with 1s. damages, subject to the opinion of this
Court, upon the following case :

The plaintiffs, at the time of the committing of the
grievances alleged in the declaration, were in posses-
sion of the mill hereinafter described as the lessees
thereof, under the lord of the manor of *Selby*. Before
the alterations hereinafter mentioned, there were two
ancient water corn mills, belonging to the lord of
the manor of *Selby*, and situate within the manor or
lordship and town of *Selby*. Between fifty and sixty
years since these two mills were pulled down, and one
water corn mill was erected instead thereof, upon their
scite, having a wind corn mill over the same. About
the year 1806 the streams of water by which the water
corn mill had been worked, were diverted from the
mill, under the authority of the act of parliament,
and in the manner hereinafter mentioned, and the
water corn mill has been ever since and still is
worked by steam instead of water. From time imme-
morial

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might sustain, or for any eventual injury that might arise to their property, by the execution of any of the powers contained in the act." Under this act the commissioner agreed with the guardian of the honorable *E. R. Petre*, then a minor, (the said *E. R. Petre* being lord of the manor of *Selby* and owner of the said mill,) in the following terms, viz. " *April 22, 1806, I, W. S., do, in pursuance of an act of parliament, entitled, &c., settle and ascertain, that the sum of two thousand pounds be paid unto Lady Petre, guardian to her son, E. R. Petre, as a recompence and compensation for the damage which may happen and be done, by totally taking away the water from the mill at Selby, in order to make a free and sufficient effluxion of water into the river Ouse, and also the sum of 100*l.* be paid to the said Lady Petre, guardian as aforesaid, for the stone and materials of the present weir, on the said dam adjoining the mill, in order to enable me to erect clough doors, and other useful purposes which the same may be wanted for, and making together 2100*l.*, which I think a fair equivalent and compensation for the same.*" The defendant is not a resiant or inhabitant within the manor and town of *Selby*, but he did, from time to time, between the month of *April, 1813*, and the commencement of the action, and whilst the plaintiffs were so possessed of the mill as aforesaid, cause to be offered and exposed to sale, in the house of *Susannah Walker*, his mother, situate within the manor or lordship and town of *Selby*; and *Susannah Walker*, as his agent and on his behalf, did sell there, to divers of the resiants and inhabitants of and within the said manor, lordship, and town, to be spent and consumed within their respective houses and dwellings within the said manor or lordship and town, about eighty stone per

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another mill out of the manor, near to the said mill. The Court of Exchequer said, "If the owner or tenant of such a mill, out of the manor, cause or persuade any of the tenants or resiants within the manor to grind there he may be prohibited by decree of this Court." An action may lie against the resiant who sold the flour, but that does not prevent the plaintiffs from recovering against this defendant. In *Roll's Abr.*, *Action sur Case* (N), pl. 4., it is said, "If, on a sale in a fair, a stranger disturb the lord in taking the toll, an action on the case lies for this;" and the *Year Book*, 9 *Hen.* 6., 45. is cited. There an action would be maintainable against the buyer for the toll; but the instance put is of an action against a stranger, between whom and the lord there was no tenure or duty: and the same appears from the *Abbott of Evesham's* case. (a) If that be so with respect to a mere stranger, a fortiori, an action lies against this defendant, who procured a resiant within the manor to sell the corn for his benefit. He may be considered as identified with his agent. It is a much stronger case than *Green v. Robinson*, for the sale here was made in a place over which the custom extends. [Bayley J. Is there any allegation in the declaration, that sufficient corn was produced within the manor for the supply of the inhabitants?] No, but if there were not, that should have been shewn as matter of defence. Then, as to the second point, the custom is altogether nugatory, unless the act done in this case be considered a breach of it: to hold that it is not, would be a great hardship on the lord. He is, by this custom, bound to keep a mill in repair, to provide servants to work it, horses and carts to carry home the

(a) Cited in the *Earl of Shrewsbury's* case, 9 Co. 50. b.

flour,

similar franchises. They are of a public nature, and, emanating from the crown, bind all the king's subjects; and therefore a person persuading another not to pay toll, as much breaks the law as the person persuaded; or if a person be persuaded not to attend a fair, no action lies against him for staying away, and, therefore, unless the party using the persuasion were liable, the lord would be without remedy. Here an action would, if at all, lie against the resiant who sold the flour. In the case of trades an action lies for taking away a man's custom by means of a slander, but not by setting up another shop, which is in substance the act of the defendant in this case. There is a great difference between the case of a person even setting up a new mill, and the case of a tenant neglecting to do suit at the lord's mill. *Prior of St. Neots v. Weston* (a), *Keeble v. Hickeringill* (b), and also between fairs, or ferries, and mills. *Blissett v. Hart*. (c) Here no obstruction was offered to those who were going to the lord's mill. *Green v. Robinson* is only an instance of the interference of a court of equity, and cannot be considered as deciding this question in a court of law. Secondly, even if the defendant were a resiant within the manor, selling flour there, produced from corn grown and ground elsewhere, would not be a breach of the custom alleged and proved in this case. The custom alleged and established by the decrees produced is, "that the tenants and resiants shall grind all *their* corn and grain, which, after grinding, shall be used ground in their dwellings." Now, the case of *Ord v. Buck* (d) estab-

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 against
 WALKER.

(a) 22 H. 6. pl. 23.

(b) 11 East, 574. (n).

(c) Willes, 512. n.

(d) 8 Br. P. C. 106.

peal to the House of Lords was against a decree in the duchy court of *Lancaster*, that an issue should be tried, and that decree was there affirmed. That case is not, therefore, any authority for this defendant, nor does it overrule *Cort v. Birkbeck* which is directly in point for the plaintiffs.

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against
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ABBOTT C. J. In this case the plaintiffs have alleged and proved an immemorial custom, binding the tenants and resiants within the manor of *Selby*, to grind at the lord's mill, "all their corn and grain which they use in a ground state in their respective dwellings within the manor;" and they complain that the defendant procured corn to be ground at other mills, for the purpose of exposing the same to sale, and selling it in a ground state within the manor to the tenants and resiants, to be by them expended in their respective dwellings. Now, the plaintiffs cannot maintain an action against the defendant for that which he is alleged to have done, unless the custom as stated in the declaration and established by evidence, draws with it a further obligation upon the tenants and resiants within the manor, not to use any meal or flour in their houses except that which is produced from corn ground at the lord's mill. And therefore, the first and material question is, whether the custom as alleged does draw with it that further obligation? Notwithstanding the observations which have been strongly urged respecting *Ord v. Buck*, I think that case is precisely in point. The custom alleged and proved there, was in substance the same as in the present case; and it was further urged there, as here, that the custom obliged the tenants and resiants not only to grind

proved would draw after it, as a consequence of law, that obligation which is now contended for. If that had followed, the issue would have been unnecessary; and therefore the House of Lords having confirmed the decree which directed the trial of an issue, in effect decided that such a consequence would not follow from such a custom. A contrary decision would have been somewhat extraordinary; for it is one thing to say, that tenants and resiants shall have their corn ground at the lord's mill; and a very different one to say, that they shall be debarred from purchasing flour produced from corn ground elsewhere. Looking back to the very ancient times when such customs arose, it may be presumed that the greater part of the tenants and resiants within the manor at that time grew their own corn, and even then it would have been extremely inconvenient if any one who did not grow it, could not lawfully have purchased flour elsewhere. The increase of population and the alteration of manners would make the mischief of such a restriction in these times incalculable. For these reasons, I think that the plaintiffs are not entitled to maintain this action, and that a verdict must be entered for the defendant. The case of *Cort v. Birkbeck* would have been entitled to much more weight had it come before the court in a shape less embarrassing to those who resisted the custom.

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BAYLEY J. I am of the same opinion. Customs are to be construed strictly. Now the custom alleged in this declaration is, that "the tenants and resiants shall grind all *their* corn and grain at the lord's mill." That could only attach upon persons having corn in a grind-

The one only prohibits them from getting their corn ground elsewhere; the other would prevent them from using corn ground elsewhere, whether they ever had it in a grindable state or not. The form of the declaration in *Cort v. Birkbeck* shews it to have been the opinion of counsel in that case, that the latter custom was more extensive than the former; and *Ord v. Buck* is decisive of the point. There the custom, without the negative part of it, was admitted, and an issue was directed to try that part. If it had followed as a consequence of law from the custom as admitted, the issue would have been wholly unnecessary. The verdict must therefore be entered for the defendant.

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Postea to the defendant.

RICHARDSON and Another *against* CAPES.

THIS was an action upon the case, brought pursuant to an order made by the Vice-Chancellor.

The declaration in one count stated the plaintiffs' possession of a mill, with the appurtenances within the manor or lordship and town of *Selby*, and that by reason thereof they were entitled to the toll of all the malt ground in their said mill; and that all the tenants, resiants, inhabitants, and dwellers of and within the said manor of *Selby*, during all the time of said plaintiffs' possession of the said mill, with the appurtenances, ought to have ground, and still of right ought to grind at the said mill, all the malt which, after the grinding thereof

Where the lord of a manor had two mills, and the tenants and resiants were, by custom, bound to grind all their malt, which they used in their dwellings, at the said mills, but might take it to either at their own option: Held, that the lord, having pulled down one of the mills, had thereby suspended the custom.

accustomed, and of right ought, to grind all their corn, grain, and malt, as well growing within the said manor as brought from other places, and spent ground in their houses within the said manor, at the said ancient mills of the lord, or one of them, paying a certain toll, or mulcture, for the same, and this custom still continues to exist within the said manor, and to be applicable to the present mill, unless the alteration of the mill, as before described, or any other circumstance stated in this case, shall be deemed to have extinguished, or suspended, or destroyed the said custom. (The case then set out the act of parliament, and the award of the commissioners as in the former case.) The horse-mill was situated in a place called the *Abbey Kiln*, at about 500 yards distance from the water corn-mills. It contained one pair of stones, used for the purpose of grinding malt only: the malt was sometimes brought by the tenants of the manor to the water-mills, and sometimes to the malt-mill to be ground, and sometimes was fetched by the tenant of the mill, but it was more usual to take it to the water-mills. It was more convenient to some of the inhabitants of *Selby* to carry to the horse-mill than to the water-mills. At the water-mills, both corn and malt were ground with the same stones, if the miller thought proper to grind the malt there. There was no dwelling attached to the horse-mill, nor did any body live or sleep there; the miller kept no person constantly there to receive the malt, but occasionally a person went there from the water-mill, when the miller wanted to grind the malt there, or when notice was given. When no person was there, the inhabitants, taking malt to the horse-mill, could at any time get the

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Tindal for the plaintiffs. The question in this case is, whether the right of the lord is extinguished or suspended by removing the horse-mill. It is not extinguished, for it is only ten years since the horse-mill was taken away, and the lord may restore it. With respect to the suspension, it may be admitted, that if there had been evidence of any inconvenience sustained by the defendant, or that the lord was unable to grind the malt at the steam-mill, that would have been an answer to the action; but nothing of that kind is stated in the case. It is merely said that some of the inhabitants found it more convenient to carry their malt to the horse-mill, not that the defendant found it so, and therefore the contrary must be presumed. But upon the facts, it does not appear to have been any part of the custom that the malt should be ground at the horse-mill. It was for the convenience of the miller, and he ground at either one or the other indifferently.

Parke contra. It is clear that the inhabitants had the option of carrying their malt to either mill, and, therefore, by taking away one of them, the lord has, at all events, suspended the custom, which is a sufficient answer to this action. It has been said, that it was not more convenient to *all* the inhabitants to carry malt to the horse-mill. But the custom is alleged as binding upon *all*, and if any are excepted the plaintiffs have not established their declaration; besides, the custom is not properly alleged. It is stated that the plaintiffs were possessed of a mill, and that the inhabitants were bound to grind at the said mill. It appears that in fact there were two mills, and that the residents might,
at

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say that he has extinguished it, and I am unwilling to prejudge that question, which may be tried if the lord thinks fit to rebuild the horse-mill. But as the custom is suspended, he cannot recover in this action, and a verdict must be entered for the defendant.

Postea to the defendant.

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against
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The KING *against* The Parish of AMPHILL in
the County of BEDFORD.

UPON appeal, against an order of two justices, made on the 5th day of *August*, 1823, for the removal of *J. Apsley*, with his wife and children, from the parish of *St. Botolph*, in the town and county of *Cambridge*, to the parish of *Amphill*, in the county of *Bedford*; the sessions confirmed the order, subject to the opinion of this Court, on the following case:

The pauper, a ropemaker, being previously settled by estate in the parish of *Amphill*, came with his family, at *Midsummer*, 1822, to reside in a house, in the parish of *St. Botolph*; he had hired it of one *Mitchell*, for 10*l.* a year; he put his own furniture into it, worth 15*l.* or 16*l.*; he continued to live in it above a year, and in

A. hired a house for 10*l.* a year, and put into it his furniture, worth above 15*l.*, and lived in it above a year. Having applied for relief, the parish officers were compelled by a magistrate's order to grant it. After the relief was granted, the landlord demanded his rent, but allowed *A.* a fortnight's time to pay it. Before that time expired, and

before the rent was paid, the pauper was removed to another parish by an order of two justices. After he had been removed, he sold his furniture, and paid the year's rent: Held, first, that the parish officers having been compelled to grant relief, *A.* had thereby become actually chargeable, and was therefore removable by statute 35 G. 3. c. 101., although he had resided above forty days on the tenement.

Held, secondly, that at the time when the order of removal was made, he had not gained any settlement in the removing parish, because he had not then paid a year's rent, as required by the 59 G. 3. c. 50.

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precedent to the gaining of a settlement. The only question is, had the pauper become actually chargeable when he was removed? If he was, then he was properly removed by statute 35 G. 3. c. 101., although he had resided about forty days upon the tenement. Now here, the parish officers were compelled, by the order of a magistrate, to relieve the pauper. The latter, therefore, had become actually chargeable.

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Nolan. The pauper was not removable from the parish of *St. Botolph*, even if he had not gained a settlement there, because at the time when the order was made, he had been residing more than forty days upon a tenement of the annual value of 10*l.* Secondly, under the circumstances stated in the case, the pauper had acquired a settlement in that parish. By the ancient law a party was irremovable, unless he came into the parish in a state of vagrancy. The stat. 13 & 14 *Car. 2. c. 12.* did not enable the incomer to acquire a settlement, but gave the justices power to remove any person within forty days after he shall come to settle in any tenement, under the yearly value of 10*l.* Its object was, rather to prevent a settlement than to confer one. The subsequent statutes 1 *Jac. 2. c. 17.* and 3 *W. & M. c. 11.* regulated the forty days continuance in a parish, in terms no further than as it was necessary “to make a settlement.” They only prolong the power of removal beyond the original forty days, in cases where the party would have been removed antecedent to 13 & 14 *Car. 2.* Hence it followed, that a person might be irremovable from a parish where he could not gain a settlement. *Rex v. Leeds* (a) and *Rex v. Martley* (b) are grounded

(a) *Burr. S. C. 524.*(b) *5 East, 40.*

upon

of the 13 & 14 Car. 2. It may also be urged, that he was not actually chargeable, for it is found that he had property more than sufficient to pay his rent, and maintain him at the time when he received relief. Secondly, he gained a settlement in the parish of *St. Botolph*; for though, at the time when the order was made, he had not actually paid the rent, yet the landlord having afterwards given him time, and it being in fact paid within the time allowed him, it must be considered as virtually paid at the time when it became due, upon the principle that *omnis ratihabitio retro trahitur, et mandato equiparatur*. He had an inchoate right to a settlement, which was afterwards perfected. Any other construction would destroy this species of settlement. It could not be intended, that to perfect the settlement the rent must be paid the instant it becomes due. This seldom happens. Suppose the landlord unwell, or absent, or dead, and his personal representative unknown, it would be unjust to hold that a tenant able and willing to pay his rent, should be deprived of his settlement by any casualty in which he had no participation; and it seems more absurd to say that the landlord, by voluntary forbearance, when neither the landlord nor tenant did or could complain of neglect or omission, the latter was to sustain the same injurious consequence.

BAYLEY J. It is unnecessary to decide in this case whether, since the passing of the 59 G. 3. c. 50., a settlement is gained by residing on a tenement, for which an annual rent of 10*l.* is payable, but the annual value of which is less. But inasmuch as the earlier statutes required

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last legal settlement, until ~~such~~ person shall have become *actually* chargeable to the parish in which he shall then inhabit;" and then two justices are empowered to remove such person in the same manner and subject to the same appeal, and with the same powers as might have been done before the passing of that act, with respect to persons likely to become chargeable. Now taking these two statutes together, I think the meaning of them is, that the statute of the 35 G. 3. c. 101. takes away altogether the power of removing, within forty days, persons likely to become chargeable, but gives the power to remove persons *actually* chargeable, at any time after they have become so, and before they have *actually* gained a settlement in the removing parish. I am of opinion, also, that on the 5th *August*, 1823, when the order of removal was made, the pauper had not acquired any settlement in the parish of *St. Botolph*. The statute of the 59 G. 3. c. 50. introduces new provisions with respect to the gaining of a settlement by renting a tenement. Before that statute any person renting a tenement of the annual value of 10*l.*, and residing on it forty days, obtained a settlement; but that statute enacts, that no person shall acquire a settlement by reason of dwelling for forty days, in any tenement rented by such person, unless such tenement shall be *bonâ fide* hired by such person, at and for the sum of 10*l.* a year at the least, for the term of one whole year, nor unless it shall be held, and the rent for the same *actually* paid, for the term of one whole year at the least, by the person hiring the same." Now in this case the pauper took the tenement at *Midsummer*, 1822, for one year; the year expired, and the rent became due and

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lord. Here the year's rent had become due and payable at *Midsummer*, and on the first of *August* the landlord gives the pauper a fortnight's time to pay it, and before it is actually paid, and before the pauper had done any act which the law considers equivalent to payment, the order of removal was made. At that time, then, the pauper had not gained any settlement in the parish of *St. Botolph*. It is therefore unnecessary to consider, whether the finding of the justices that the annual value of the tenement was less than 10*l.*, is material or not. I am of opinion, that the subsequent payment of rent does not, by retrospective operation, give the party a settlement in the parish of *St. Botolph*, at the time when the order of removal was made. I fully agree with my Brother *Bayley*, that since the 35 G. 3. c. 101., it is not necessary to remove paupers actually chargeable, within forty days after they have come to settle, but that they may be removed at any time after they have become so chargeable.

LITLEDALE J. It is unnecessary in this case to decide the question, whether, in opposition to the contract of the parties, any other value than the rent actually payable can be set up, because since the statute of the 59 G. 3. c. 50., no settlement can be gained until a year's rent is actually paid. Now in this case the order of removal was made on the 5th of *August*, and the year's rent was not paid until the 14th. The subsequent payment of the rent cannot, by retrospective operation, give him a settlement at the time when the order of removal was made, and therefore the pauper had not gained any settlement at that time, and having then become actually

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chargeable,

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names of the persons on whose account the payments were made, the sums paid, and, in some instances, the purposes for which they were made. It then proceeded to state that the appellant would insist upon the appeal that all these items ought to be struck out of the accounts and disallowed. The counsel for the respondents objected to the hearing of the appeal, on the ground that the particular causes and grounds of appeal against the items contained in the said notice were not specified and stated in the said notice, as directed and required by the statute 41 G. 3. c. 23. s. 4. On the 14th day of *January* 1824, the day before the appeal came on to be heard, the attorney for the respondents and the attorney for the appellant entered into the following admissions. "We do agree to admit that all the payments charged in the accounts of the respondents to which the appellant objects, were actually made to or for the use of the several persons to whom the same are charged to have been paid, and that the several sums charged in such accounts to have been paid to three several persons (named in the notice of appeal) respectively, were for debts contracted by the overseers of the poor of the township of *Soothill*, in one or more years previous to the year in which the respondents were overseers, and were not contracted by the respondents for the service of their current year, and the respondents undertake to produce upon the hearing of the appeal the original accounts, and vouchers regarding the items and sums of money objected to by the appellant. The court of quarter sessions, without expressing any opinion as to the validity of the notice, considered the admissions as a complete waiver of the objection to it, and entered into the merits of the said appeal. The cause

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writing is to be signed by the party giving it, or his attorney, and to be left at the place of abode of the officers, and the sessions are not to examine into any other cause or ground of appeal than those which the notice specifies. Two questions therefore arise: Has there been such a notice as the statute requires? Has there been such a waiver? In this case the original notice, which was served eleven days before the commencement of the sessions, merely stated that the appellant would object to thirty-five items or charges of payment, which he specified. On what grounds he would object he did not state. The day after the sessions commenced, being the day before their adjournment day, the attornies for the appellant and respondents agreed to admit, that all the payments objected to were in fact made, but that three of them were for debts contracted in prior years, not for debts contracted for the service of the year to which the accounts referred, and the respondents agreed to produce the original accounts and vouchers regarding the items objected to. The sessions expressed no opinion as to the notice, but thought these admissions a waiver of all objections to it. As to the waiver, the statute expressly provides that the sessions shall not examine or enquire into any ground of appeal not specified in the notice, with this single exception only, of consent by the overseers, signified by them or their attorney in open court, and we think that the statute has excluded, and intended to exclude, all questions of waiver in any other way, and that as there was no such consent as the statute requires, we cannot enter into the question of any other species of waiver. Then can it be said that this notice states and specifies the particular causes and grounds of appeal? It states only,

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CLEMENTI and Others *against* WALKER.

CASE. The first count of the declaration stated that the plaintiffs, before and at the time of the committing the grievances thereafter mentioned, were the *proprietors* of the copyright, of and in a certain book being a musical composition, called "Vive Henri Quatre," the celebrated national *French* air, with an introduction and eight variations for the piano forte, first printed and published within fourteen years last past; to wit, at &c. *Westminster*, in the county of *Middlesex*, yet that the defendant well knowing the premises, but contriving, &c., theretofore and after the passing of a certain act of parliament in the 54 G. 3., to wit, on the 26th day of *January*, 1822, and on divers other days and times between that day and the day of exhibiting the bill of the said plaintiffs against the defendant, to wit, at, &c., knowingly, wrongfully, and injuriously, and without the consent of the plaintiffs, so being the proprietors of the copyright of and in such book first had and obtained in *writing*, printed and caused to be printed, divers, to wit, 2000 copies of the said book of the plaintiffs, by means whereof the plaintiffs were greatly injured and damnified to wit, at &c. There were other counts for having published and exposed to sale, the same work, &c. At the trial before *Abbott C. J.*, at the *Middlesex* sittings in

An author publishes his work in a foreign country in 1814, and afterwards agrees to sell to *A.* the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. *A.* publishes the work in *September* 1814, in *England*. In 1818, *B.* publishes the same in *England*. In 1822, the author, by an agreement in writing, assigns to *A.* the exclusive right of printing the work in *England*: Held, that *A.* did not, by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in *England*: secondly, that that could not be deemed a publication by the author, not being made

on his account or for his benefit: thirdly, that the publication by *B.* in 1818, was a lawful publication: and, fourthly, that the author could not afterwards, in 1822, by making a valid assignment to *A.*, enable him to maintain an action against *B.* for selling a copy of the same work after such assignment was executed.

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sale made by him to them in 1814. The defendant sold a copy of the work in question to Mr. *Lindsey* on the 20th of *February*, 1822, at his shop in *London*, for two shillings. Such copy was on *English* paper and from an *English* engraving. The son of the defendant, in 1818, purchased a copy of the composition published by *Pleyel* at a shop in *France*, with a number of others by the same author, which the defendant caused to be engraved and published in *England*, in *December*, 1818. The defendant's edition was a fac-simile of the copy so purchased by his son, and there was no difference between that edition and the edition published and sold by the plaintiffs in *England*. There is a register kept at *Paris*, and by the law of *France* all musical publications must be registered, and a copy of the said composition was duly registered and deposited there the 17th of *June*, 1814. The defendant's son never heard or saw the composition until he saw it at the shop in *Paris* in 1818. This case was argued on a former day at these sittings, by *Comyn* for the plaintiffs and *Campbell* for the defendant.

For the plaintiffs, it was insisted that they, as the proprietors of the copyright, were entitled to recover. The statute 8 *Anne*, c. 19. gave the sole right of printing any book to the author or his assignee for fourteen years, to commence from the day of his first publishing the same. That statute is explained by the subsequent statutes of the 41 G. 3. c. 107. and the 54 G. 3. c. 156. They were all passed to secure the rights of authors, and ought to be construed most favourably for them. The publication of the work by the plaintiffs in *September*, 1814, did not confer upon them the exclusive right of printing the same, because there was no consent of
the

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books, all shew that the legislature contemplated a work published for the first time in *England*. Sec. 7. enacts, that the act shall not extend to prevent the importation of any book printed in *Greek, Latin*, or any other language beyond the seas. From that section it appears, that any book already printed beyond the seas may be imported and sold here, and if that be so, why should it not be reprinted here? The reprinting would give employment to *British* industry and capital. The 12 G. 2. c. 36. prohibits the importation of books originally composed and printed here and afterwards reprinted abroad, but it does not prohibit the importation of books published abroad in the first instance. The author in this case, by once publishing his work in *France*, dedicated it to the public, and cannot afterwards claim an exclusive copyright in this country. Suppose the work had been published abroad for fifty years, and some person had reprinted it here, surely the author after such a lapse of time could not for the first time claim the work, reprint it, and then bring an action against the party who had reprinted it here. The plaintiffs acquired no right until 1822. The defendant had before that time published the work here. That was a lawful publication, for he might at that time have imported any number of copies printed in *France*. Having once published, it was not competent to the author after such a lapse of time to claim the exclusive right of publishing in this country.

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Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court, and after stating the facts of the case proceeded as follows:

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them and their families, and to prevent such practices, and for the better encouragement of learned men to write useful books, it enacts, that the authors or purchasers of the copyright of books already printed shall have the sole right of printing such books for twenty-one years, and the authors of books not then published, or thereafter to be composed, should have the sole right of printing for fourteen years, and if any other person should print, reprint, or import, without consent from the proprietors, signed in the presence of two witnesses, or knowing of its having been so printed, should sell, without consent, he should pay a penalty. By section 2. no person shall be subject to these forfeitures for printing or reprinting unless the title of any book *thereafter to be published* shall, before such publication (i. e. before it is published by the author) *be entered in the register book of the company, at Stationers' Hall.* By section 5. nine copies of each book that shall be printed and published as aforesaid, shall be delivered to the warehouse-keeper of the company at *Stationers' Hall, before such publication made*, for the use of the royal library, and the libraries of *Oxford, Cambridge, the Scotch universities, Sion College, and the Advocates' Library, in Edinburgh*, on pain of forfeiting *5l. for every copy, besides the value of the copy, and if the penalties are incurred in Scotland they shall be recovered in the Court of Session.* By section 7. this shall not prohibit the importation, vending or selling of books in any foreign language, printed beyond seas. The statute of *Anne*, therefore, not only gives protection to authors as to books *thereafter to be published*, but to books *previously printed*, but the *British* legislature must be supposed to have legislated with a view to *British* interests and
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penalty of 5*l.* for each copy not delivered, and the value, so that it clearly contemplates that the publisher must have a residence within this kingdom, and evidently looks not to a foreign but to a home publication. This last statute introduces, for the first time, after the word *composed*, the additional words “printed and published,” and therefore explains what might have been understood from the former provisions. Upon this view of the several statutes it appears to me that the legislature contemplate publications here and here only, and that they contemplate such publications only when they are made by the author, or under such consent and authority from him as the statutes require, and that they contemplate such publications only when they are capable of advancing literature here, viz. before the work is published here, by a person who has obtained it fairly and bonâ fide, under a previous publication, by the author in a foreign country. Now, here the work was composed before *June* 1814. In that month the author sanctioned a publication of it in *France*, and five copies of it were deposited in a musical dépôt at *Paris*. In *July* 1814 the author made a verbal arrangement with the plaintiff, and he published in the *September* following; but the publication was not a publication by the author, so as to entitle him to the statutory privilege, nor was it such a publication as would secure the right to the plaintiff, because it had not such authority or consent from the author as the statutes required. It was then an unprotected publication, and not a publication which would give an exclusive right, or preclude any other from publishing. Whilst things remained in this state the defendant published, viz. in 1818. The plaintiff had nothing to give him the semblance of a valid right

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give him any right to stop the sale of the defendant's publication, and consequently that this action cannot be maintained:

Judgment of nonsuit.

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The KING *against* COOKE.

INDICTMENT for a misdemeanor. Plea, *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, who is indicted by the name of *R. S. Cooke*, late of, &c. gent., in his own person comes, and having heard the said indictment read, prays judgment of the said indictment, because he says, that on the day of taking the inquisition aforesaid, and long before, he was and from thence hitherto has been, and still is Lord *Stafford*, Baron *Stafford*; and the state, degree, title, and honor of Lord *Stafford*, Baron *Stafford*, on the day of taking the inquisition aforesaid, and long before had and enjoyed, and still has and enjoys; and this he is ready to verify; wherefore, &c. Demurrer and joinder. In *Easter* term *Campbell* moved for leave to amend the plea.

The Court will not allow a plea in abatement, to an indictment for a misdemeanor, to be amended.

Where a defendant pleads in abatement to an indictment for a misdemeanor that he is a peer, he must state that he is a peer of the United Kingdom, and the mode in which he derives his title.

Per Curiam. This plea merely goes to the description of the defendant, and avoids the merits of the question. Whether it be true or false, the indictment will be tried in the same mode. No instance can be found in which such a permission has been granted. The Court will therefore abide by the rule established in civil cases, not to allow a plea in abatement to be amended.

Rule refused.

The demurrer was now argued by

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first would be triable by record, the second by production of the letters patent, the third and fourth by the country. *Rex v. Knollys*. It is therefore necessary that the plea should show how the title is derived, in order that the prosecutor may know how to take issue upon it.

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Campbell, contra. The words of this plea must have a reasonable intendment, and the claim of the defendant must be construed a claim to be a baron of *England*. It would certainly be difficult to support the plea without the aid of the act of parliament, 1 *Ed.* 6. If that be a public act it must be considered as embodied in the plea. By that act Lord *Stafford* was restored in blood, and it was enacted, that he should have in parliament and other places, the room, name, place, and voice of a baron. And by a subsequent section he is authorised to take the arms of the barons of *Stafford*. In all judicial proceedings, where a person is described by a title of peerage in *England*, he must be taken to be a peer of *England*. The act in question is a public act. All statutes relating to measures of state are public. This act touches the king's prerogative, it also affects one branch of the legislature, and therefore all the peers of the realm. It must, therefore, be considered as a public act, and the Court must take judicial notice of it. The peerage is thereby shewn to be an *English* peerage, the origin of it is also shewn, and the defendant can only have it by descent. There is not then any difficulty as to the mode of trial, and the plea is good, without expressly averring that he claims by descent.

BAYLEY J. If the indictment in this case had described the defendant as a peer, still he would not have been entitled to claim any privilege of peerage. The

only title created by that act, and it says that he shall be a baron, but does not state by what appellation. Then the privilege of bearing arms is given in terms which raise a presumption, that the old title was "*Baron of Stafford*," not *Baron Stafford*, which is the title here claimed. If, therefore, we exclude this act from our consideration, the plea is bad, as not shewing how the title is derived. If we take the act into consideration as a public act (upon which point I give no opinion) still in order to make the plea good, it was necessary for the defendant to aver that he was heir male of the person thereby created *Lord Stafford*. For these reasons there must be judgment of respondeat ouster.

Judgment accordingly.

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The King
against
Cook.

BLAKE *against* JOSEPH ATTERSOLL.

DEBT on bond in a penal sum of 2500*l.* conditioned for payment by defendant, and one *John Attersoll*, deceased, of an annuity of 125*l.* to the plaintiff for life. Breach, non-payment of the arrears of the annuity. Plea, first cravingoyer of the bond and condition. The condition recited a marriage settlement of the plaintiff and the sister of the defendant, and an agreement by *Joseph Attersoll*, deceased, to secure 10,000*l.* by the assignment of certain dock shares to trustees upon the trusts of the settlement, and the plaintiff was to have the interest of this 10,000*l.* for his life. The condition

The annuity act, 53 G. 3. c. 141., applies only to annuities granted for pecuniary consideration, and therefore, where by marriage settlement 10,000*l.* was to be paid by the father of the wife to trustees upon trust to pay the interest to the husband for life; and the father died without having paid the prin-

cipal to trustees, and his affairs being embarrassed, and it being uncertain whether there would be sufficient to pay his debts, the husband agreed to accept in lieu of the 10,000*l.*, 5000*l.* and an annuity of 125*l.* payable during his life: it was held, that such annuity granted by the executors of the father did not require to be enrolled by the statute 53 G. 3. c. 141.

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then

and the trustees of the marriage settlement had released and discharged the executors from the dock shares and the sum of 10,000*l.*, and from all claims and demands in respect of the marriage settlement. The condition of the bond, then, was for the payment of the annuity by the executors by quarterly payments. The plea then stated, that the bond was made after the 53 G. 3. and that no memorial was enrolled, as required by that act. Another plea was, that at the time of the release, such release and discharge was worth the sum of 50*l.*, and that no memorial was enrolled. To these pleas there was a general demurrer.

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against
ATTERSOLL.

Jeremy was to have argued in support of the demurrer; but the Court called upon

Stephen contra. There being no memorial of this annuity, it is void by the 53 G. 3. c. 141. It is true, that in *Crespigny v. Wittenhoom* (a), it was held that an annuity granted in consideration of the grantee's giving up his business to the grantor, need not be registered under the 17 G. 3. c. 26.; but the reasons upon which that decision was founded do not apply to the present case. There it was inferred from the preamble, that the statute was confined to annuities granted for pecuniary considerations. The matters contained in that preamble are not to be found in the 53 G. 3. c. 141. It may fairly be inferred, therefore, that the latter statute was intended to have a wider operation. The second section does not pursue the terms of the former act. It requires the pecuniary consideration for grant-

(a) 4 T. R. 790.

ing

niary. Even if the decision in *James v. James* be right, still here the consideration for the annuity was money's worth, and not being a voluntary annuity, it is not within the exception; and one of the pleas expressly alleges that the release was of the value of 50*l*.

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against
ATTERSOLL.

BAYLEY J. This case has been put by Mr. *Stephen* as strongly as it could be; but I am satisfied that the annuity secured by the bond is not an annuity required to be enrolled by the 53 G. 3. c. 141. The 17 G. 3. c. 26. recites that the pernicious practice of raising money by the sale of life annuities had of late years greatly increased, and was promoted by the secrecy with which such transactions were conducted. The mischief contemplated in the preamble, therefore, was the practice of raising money by the sale of life annuities. Now, although the 53 G. 3. c. 141. has not the same large words in the preamble, yet there is sufficient in the other parts of it to shew that the legislature had in view the same object, viz. preventing the sale of life annuities. Thus, sect. 6. enacts that annuities shall be void, in case any part of the consideration for the *purchase* of such annuity shall be returned, or in case *such* consideration be paid in notes, if the notes shall not be paid when due, &c. So sect. 8. enacts that all contracts for the *purchase* of any annuity with any person under age shall be void. The recurrence of the word "*purchase*" in the several clauses, shews clearly that the legislature intended to proceed on the same principle, and had in view the same object, viz. the restraining of the practice of the sale of life annuities. Then, is this the case of the sale of a life annuity? It appears on the pleadings, that on the marriage of the defendant *Blake* with

interest; and there Lord *Kenyon* says, "This annuity is not granted in consideration of money paid to the grantor, but of resigning the grantee's situation in favor of the grantor. In this case, the grantee of an annuity is the executor of an insolvent estate, out of which there might probably be no surplus. There was no consideration money from the grantee to the grantor. The exception in the 53 G. 3. c. 141. has been very properly commented upon in argument; but I think many of the cases mentioned in that exception, for instance, the case of annuities granted by wills, or marriage settlements are not within the enacting clause. Sect. 2. requires that the pecuniary consideration shall be enrolled according to a given form set out in the act. In that form in the column headed "consideration, and how paid," are the words "so much paid in money, so much paid in bank notes, or other notes or bills of exchange." It appears clearly, therefore, that that section contemplated a consideration paid in money, or promissory notes or bills of exchange, and construing that section with the tenth, I am of opinion that the legislature intended an annuity bought on the one hand, and sold on the other for a consideration moving from the grantee to the grantor. In this case there was no consideration moving from the grantee to the grantor; but the former gave up his right to a large sum of money to which he was entitled, in consideration of the latter securing him the smaller sum. For these reasons, I am of opinion that our judgment must be for the plaintiff.

HOLROYD J. I am of the same opinion. The grantee of this annuity gave up the chance of getting the whole sum due to him from the estate of the deceased; and
with

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 BLAKE
 against
 ATTERSOLL.

1824.

The KING *against* The Inhabitants of KNAPTOFT.

UPON appeal against an order of two justices, dated the 19th of *August*, 1823, for the removal of *Elizabeth Burdett*, single woman, then with child, from the parish of *Gumley*, in the county of *Leicester*, to the parish of *Knaptoft*, in the same county; the sessions confirmed the order, subject to the opinion of this Court on the following case:

The respondents, in support of the order, proved that the father of the pauper, while residing in the respondent's parish, had received relief from the parish of *Knaptoft*, for five years prior to 1815. The parish of *Knaptoft*, then offered in evidence an order of the court of quarter sessions, upon an appeal in 1815, between the same parishes, respecting the *settlement of a brother of the pauper*, by which an order, adjudging the brother to be settled in the parish of *Knaptoft*, was quashed. This was objected to by the council for the parish of *Gumley*, and rejected by the court. Another order was then produced, whereby the pauper, *Elizabeth Burdett*, was removed from *Gumley* to *Mowsley*, in 1822, which was afterwards quashed by consent. The appellants then called the chairman of the court in 1815, who proved that his notes of the trial were destroyed, and that he did not remember the evidence. They then called the father of the pauper and asked him whether he was a witness at the trial in 1815; to this he answered in the

Upon the trial of an appeal at the quarter sessions, the respondent parish proved relief granted to the father of the pauper by the appellant parish before the year 1815. The appellant parish then tendered an order of sessions made in the year 1815, quashing an order of justices for the removal of the brother of the pauper to the appellant parish. And they tendered parol evidence to shew that the ground of the decision of the court of quarter sessions was, that the father of the pauper had not at that time any settlement in the appellant parish, and consequently, that the son had not any derivative settlement there: Held, that even if parol evidence was admissible to prove the ground of the decision of the

sessions, still that the order of sessions was not evidence that the father of the pauper was not settled in the appellant parish in 1815, because the father's settlement was a matter that arose collaterally on the trial of the first appeal.

affirmative.

by the sessions in 1815 was, that the brother had not a derivative settlement in *Knaptoft*, or in other words, that his father was not then settled there. That is evidence offered to explain the judgment, viz. to shew that the Court decided a particular point, which the judgment does not profess to decide. The order of quarter sessions quashing an order of removal is equivalent only to a judgment of nonsuit. It is quite clear, that parol evidence would not be admissible to shew what was the point actually in a course of inquiry, where the plaintiff chooses to submit to a nonsuit. There is only one case where the evidence given at a former trial is admissible, viz. when the witness is dead; but even then it is admissible only in a case where the same point is at issue.

Clarke and Marriott, contra. Relief is only *prima facie* evidence of a settlement, and therefore it was competent to the appellants to shew that the father of the pauper had not any settlement in their parish, and for this purpose the order of sessions was tendered in evidence. Now when an order of removal is quashed by the sessions, it is conclusive between the same parties that the settlement of the pauper is not in the parish to which he was removed. And if, on the face of the former order of sessions it had appeared to have been decided, that at the date of that order the pauper's brother had not any derivative settlement in *Knaptoft*, or in other words, that his father was not settled there in 1815, it would now be conclusive as to that point between the same parties. Now that was the point actually decided upon the former appeal, although it does not appear on the face of the order. The parol evidence was tendered, to shew what the point litigated and adjudicated really was. This is not

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against
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ants of
KNAPTOFT.

in another parish, or that he never had any settlement in *Knaptoft*, or that the respondents had not given sufficient proof of any such settlement. The case does not state on what ground the order was quashed. But it has been stated in the course of the argument, that the point then tried, and upon which the sessions actually adjudicated, was, that the pauper had not at that time any derivative settlement in *Knaptoft*, because his father was not then settled there; that in fact the point tried was, whether the father's settlement was then in *Knaptoft*. If we thought that the evidence of that fact would be admissible, and would be material if stated in the case, we should send it down again to the sessions. But we are of opinion, that the order of sessions in 1815 would not be admissible in evidence, for the purpose of shewing that the pauper, in 1815, was not settled in *Knaptoft*. If it be admissible at all, it must be upon the same principle upon which judgments of the superior courts are received in evidence. Now the rule upon that subject is thus laid down, in the *Duchess of Kingston's* case (a), by Lord Ch. J. *De Grey*: "The judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the *same matter directly in question* in another court: secondly, the judgment of a court of exclusive jurisdiction, *directly upon the point*, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question,

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against
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ants of
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(a) *Howell's St. Tr.* vol. xx, p. 538.

parish. The point decided, therefore, by the sessions in 1815 was, that the brother of the pauper in this case was not at that time settled in the parish of *Knaptoft*; but it is said, that although that is the only point which appears to have been decided upon the face of the judgment itself, still that the point actually decided upon the evidence then adduced was, that the settlement of the father of the pauper was not at that time in *Knaptoft*; and consequently that the pauper himself had no derivative settlement there. The parol evidence was offered to prove that such was the point then litigated and adjudicated. Without deciding whether such evidence was admissible to explain the ground of the judgment, it is sufficient to say, that that was a point which arose collaterally, and, therefore, upon the principle laid down by Lord Ch. J. *De Grey*, the order of sessions would not be evidence to prove that fact in another case between the same parties. For these reasons, therefore, we think that the order of sessions ought to be confirmed.

Order of sessions confirmed.

1824.

The King
against
The Inhabit-
ants of
Knaptoft.

The KING *against* The Inhabitants of St. Nicholas,
in the Borough of LEICESTER.

UPON appeal against an order of two justices, for the removal of *Caroline Littlewood* from the parish of *All Saints*, in *Derby*, to the parish of *Saint Nicholas*, in *Leicester*, the sessions confirmed the order, subject to the opinion of this Court, on the following case:

The pauper was the illegitimate child of *Elizabeth Littlewood*, deceased, and was born in the month of

An illegitimate child born in an extra parochial place does not follow the settlement of its mother.

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May,

Nolan and Fynes Clinton, contra, were stopped by the Court.

1824.

The KING
against
The Inhabit-
ants of
ST. NICHOLAS,
LEICESTER.

BAYLEY J. The argument in support of the order of sessions is founded upon the assumption, that every person is by law entitled to a settlement in some place; but that is by no means the case, for foreigners have not any settlement in this country. A settlement attaches to those persons only, concerning whom those circumstances may be affirmed, which acts of parliament say shall give a settlement. Generally speaking, an illegitimate child is settled in the parish where it is born. There are some exceptions to this general rule, noticed in the treatises on the poor laws. In most of the excepted cases the mother, at the time of the birth, is in law supposed to be in the place of her settlement, where she ought to be: as where a woman with child is removed out of one parish into another, through the fraud or collusion of its officers, or where the child is born pending an order of removal. In one of these cases, the child, when born, is settled in the parish from which the mother has been fraudulently removed; in the other, in the parish to which she is ordered to be removed. (a) In this case the child was born in an extra-parochial place. It therefore has not any settlement by birth, and being a bastard, it can derive none from its parent. In such cases, however, it is entitled to remain with its mother as long as the purposes of nurture require it, and it will afterwards be entitled to relief as casual poor, although it has not any settlement. We are all of opinion that the order of sessions must be quashed.

Order of sessions quashed.

(a) See several cases in 2 *Bott. c. 1. s. 1.*

ment *therein*. The words *such service* evidently refer to a service under the contract of hiring for a year; and such service will give a settlement in that parish into which the party is lawfully hired for a year. In *Rex v. Crocombe* (a) a yearly hiring in the second year was presumed from the continuance in the same service without any new agreement, and then it is the same as if there had been an express contract of hiring in that year; and if that were so, it is quite clear that a settlement was gained by the service in the second year. From the judgment delivered by *Willes J.*, in *Rex v. St. Giles, Reading* (b), that appears to have been the ground of the decision in *Rex v. Crocombe*. They cited *Rex v. Fillongley* (c) and *Rex v. Denham*. (d)

1824.

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The King
against
The Inhabit-
ants of
~~Arrethore~~

Marriott and Humfrey, contra. Where there has once been a contract of hiring for a year, and the service continues, it need not be under any new contract of hiring for a year in order to confer a settlement. The 8 & 9 W. 3. c. 30. s. 4. recites that some doubts had arisen “touching the settlement of unmarried persons not having child or children, lawfully hired into any parish or town for one year, and enacts that no such person so hired as aforesaid shall be adjudged or deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the *same service* during the space of one whole year.” Under this statute, therefore, if there has been once a contract of hiring for a year, a service under the same master for one year, though not under the original contract, will give a settlement. That was

(a) *Burr. S. C.* 256. 2 *Bott.* 278.(b) *Caldecott*, 54.(c) 1 *B. & A.* 319.(d) 1 *M. & S.* 331.

the

removed to another parish, and the pauper continued to live with him about six months in the latter parish upon the terms of the first contract, and was paid wages at the same rate. Now in that case, at the expiration of the first year, a new hiring for a year was fairly to be presumed from the circumstance of the pauper continuing in the same service without any alteration of the terms; and if the service in the last year was to be considered as a service under a renewed yearly hiring, that case does not at all bear upon the present. That such was the ground upon which the Court proceeded in that case appears from what was said by *Willes J.* in delivering the judgment of the Court in *The King v. St. Giles, Reading (a)*; “*The King v. Croscombe* does not apply, because the court presumed the continuance of the old contract.” There being no authority therefore bearing upon the subject, we must look to the words of the statute 3 & 4 *W. & M. c. 11. s. 7.*: they are, “if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement *therein*.” The word *therein* refers to the parish or town into which the party has been hired for one year. The settlement therefore attaches to him in that parish or town where he has the character of a servant hired for a year. The 8 & 9 *W. 3. c. 30.* recites, “that doubts had arisen touching the settlement of unmarried persons, not having child or children, lawfully hired into any parish or town for one year;” and enacts, “that no such person *hired as aforesaid*, (*i. e.* lawfully hired into the parish for one year,) shall be adjudged or deemed to

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The King
against
The Inhabit-
ants of
APETHORPE.

(a) *Caldecott*, 56.

have

that time, therefore, a service for forty days conferred a settlement. The 3 & 4 *W. & M. c.* 11. s. 3, enacts, that the forty days' continuance of any person in a parish or town, which then conferred a settlement, should be accounted from the publication of a notice in writing which he should deliver to the churchwarden or overseer of the poor, and the latter was to cause it to be read publicly in church. Sect. 6. provided, that any person exercising an annual office in the parish during the year should gain a settlement without having delivered such notice in writing; and sect. 7. enacted, that if any unmarried person, not having any child or children, should be lawfully hired into any parish or town for one year, such service should be adjudged and deemed a good settlement therein, although no notice in writing were delivered and published. Now, the words *such service* must refer to a service under the contract of hiring mentioned in the former part of the clause; and if that be so, this statute clearly required that the service should be under a contract of yearly hiring. The legislature in this statute seem to have considered the exercising of an annual office in the parish during the year, and the being hired into the parish for a year, as equivalent to the notice to the parish which was required by the former section. Inasmuch, however, as the exercising of the parochial office was not sufficient to give a settlement unless it were exercised during the year, doubts were entertained whether the service under the contract of hiring should not also continue during a year. If the service for the year were not required by that statute, the contract of hiring for the year is the only circumstance from which the parish could be deemed to have had notice; and if so, it was essential that

1824.

The King
against
The Inhabit-
ants of
Aberdeen.

1824.

MILLS *against* FUNNELL.

DECLARATION stated, that the plaintiff, treasurer to the commissioners acting under a certain act of parliament, passed in the 50th year of G. 3., entitled “An act to repeal an act, made in the 13th year of his present Majesty, for paving, lighting, and cleansing the town of *Brighton*, in the county of *Sussex*, and removing and preventing nuisances and annoyances therein; for regulating the market; for building and repairing groynes, to render the coast safe and commodious for landing coal and culm, and laying a duty thereon; and for making other provisions in lieu thereof; and for regulating weights and measures, and building a town-hall;” complained of the defendant of a plea, that he render to plaintiff (as such treasurer) 20*l.* 8*s.* 4*d.*, which he owed, &c.; for that whereas, after the passing of the act, to wit, on the 8th of *May*, 1822, at, &c., at a certain meeting of the commissioners then and there duly held in pursuance of the said act, they duly made a certain order in writing in pursuance of the act; by which said order the said commissioners then and there duly ordered and directed, that from the first day of *May* then instant, for one year, a rate or duty should be paid of 3*s.* per chaldron on all sea-coal, culm, or other coal, which should be brought or delivered within the limits of the said town; the declaration then set out a similar order, duly made on the 30th *April*, 1823, to take effect from the 1st day of *May* then next, for one year, of which

By a local act, giving to commissioners certain powers to be exercised for the preservation of the town of *B.* from the encroachments of the sea, it was enacted that there should be paid to the commissioners any rate or duty which they should think fit to order, not exceeding the sum of 3*s.* for every chaldron of coal brought or delivered within the limits of the town :
Held, that under this act a duty was payable in respect of each quantity of coals, amounting to a chaldron, brought into the town although at different times and in several parcels, each containing a less quantity than a chaldron.

said

respect of the whole quantity the count was bad. Thirdly, that the act of parliament did not give any right to a duty in respect of coals brought into the town, in less quantities than a chaldron. (a)

1824.

MILLS
against
FUNNELL.

(a) The following is the clause of the statute upon which the principal question in the case was raised.

And whereas by the said recited act, section 107., it was enacted that the commissioners named and appointed in and by the same should be trustees for repairing, improving, maintaining, and preserving the groynes that had been erected for the preservation of the said town, and erecting and building any new ones, or such other works as should appear to them most proper for that purpose; and the sum of sixpence for every chaldron of sea coal, culm, and other coal that should be landed on the beach of the coast of the said town was directed to be paid to the said commissioners; and the commissioners were thereby empowered to borrow any sum of money not exceeding the sum of 1500*l.* upon the security of the said duty: And whereas the said commissioners did accordingly borrow the sum of 1500*l.* upon the credit of the said duty, great part of which is now due and owing: And whereas, since the passing of the said act, great encroachments have been made by the sea upon the coast adjoining the said town, and the said duty hath been found inadequate to the charges and expences of erecting new groynes, walls, and other fences or works, which are now necessary for the safety and protection of the said town against such encroachments; be it therefore enacted, that from and after the passing of this act, it shall and may be lawful to and for the said commissioners, and they are hereby authorised and required from time to time, as to them shall seem necessary and expedient, to repair, improve, and maintain, add to, alter, or remove the groynes, walls, or other fences or works already erected and built, or to be made, erected, and built, or to cause to be made, erected, and built, any new groynes, or other works whatever, which may appear to them necessary, requisite, or proper for the safety of the said town or any part thereof, or any part of the beach or shore within the said town; and that from and after the passing of this act there shall be paid to the said commissioners, or to their collector or collectors, or to such person or persons as they shall from time to time appoint to collect and receive the same, any rate or duty which the said commissioners shall think fit to order and direct, not exceeding the sum of three shillings for *every chaldron* of sea coal, culm, or other coal which shall or may be landed on the beach of the said town, or in any other manner by land-carriage, or otherwise brought or delivered within the limits of the said town.

an entire sum for so many hundred and a part of a hundred, and it was held upon demurrer that the plaintiff might enter a remittitur as to the sum claimed for the part of a hundred, and have judgment for the residue.] The act of parliament imposes the duty upon every chaldron brought into the town. Now, in this case, in no instance was the quantity of a chaldron brought into the town. The duty therefore never attached. In *Ingledeu v. Cripps* it was held, that under a covenant to pay so much for every hundred stacks of wood, the party is not liable to pay for a less quantity than a hundred. So on the same principle, the public are not bound to pay a duty for any quantity less than a chaldron.

1824.

MILLS
against
FURNELL.

BAYLEY J. I am of opinion, that the rule for arresting the judgment must be discharged. If the first order of the commissioners were retrospective, it would be void for the by-gone time, but good for the residue; for it clearly applies to such coals as should thereafter be brought into the town. The principal question in this case is, whether the duty imposed by the act of parliament attaches in respect of coals brought or delivered within the limits of the town in separate parcels containing a less quantity than a chaldron, but the aggregate amount of which exceeds a chaldron. The legislature contemplated, that the inhabitants of *Brighton* would derive a great benefit by having the coast rendered safe and commodious for landing coal and culm; and, therefore, thought it just that they should contribute to the expence which would necessarily be incurred in building and repairing groynes, and the other improvements contemplated in the act. The 13 G. 3. c. 34. had

HOLROYD J. I also think that there is no ground for arresting the judgment in this case. If the order were retrospective, I should have great difficulty in saying that it is therefore void in toto; but I think it is not retrospective. It is true, that the order speaks of a day past with reference to the calculation of time during which it is to continue in force, but the duty is to be paid in future. In effect it is, that the duty is to be paid in future for a year, to be calculated from the 1st of *May*. It is not necessary to decide in this case, whether any duty would attach upon a fraction of a chaldron. Worded as this order is, I incline to think it would not; but I think it clearly would attach if a quantity amounting to a chaldron were brought in at different times, because the duty is payable for every chaldron brought or delivered within the limits of the town. There is nothing in the act to shew, that the legislature intended that the duty should not attach upon a chaldron of coals, brought in in small quantities, at different times; and in order to give full effect to the act of parliament I think we are bound to hold, that the duty is payable in respect of every chaldron of coals brought into the town, though in parcels containing a less quantity than a chaldron, for otherwise the object of the act might be defeated. As to the objection that the duty is claimed in respect of sixty-eight chaldrons and four bushels, I think that does not invalidate the count, because as to so much as is claimed in respect of the four bushels, the plaintiff may enter a remittitur, and have judgment for the residue.

LITTLEDALE J. I am of the same opinion. If the order were retrospective it would only be bad in part, but

1824.

MILLS
against
FUNNELL,

Year of GEORGE IV.
that there is no ground

1824
Mills
Funnel

Year of GEORGE IV.

1824. s. 12. imposes a certain
pounds weight of cotton-
contended, that no duty
of any quantity of cotton-
pounds weight, provided
s, and each ship con-
weight. Now, as
revenue for the
upon cotton-
would be
less

think
a sum of
public purposes
act for every chal-
the limits of the town,
in distinct parcels containing
an obaldron or not.

Rule discharged.

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1824.
Mills
Funnel

lic benefit. The 59 G. 3. c. 52. s. 12. imposes a certain duty upon every hundred pounds weight of cotton-wool. It might as well be contended, that no duty would be payable in respect of any quantity of cotton-wool exceeding one hundred pounds weight, provided it were imported in different ships, and each ship contained less than one hundred pounds' weight. Now, as the object of that act was to raise a revenue for the public benefit, by the imposition of a duty upon cotton-wool, I cannot entertain a doubt that a duty would be payable in respect of cotton-wool, imported in less quantities than one hundred pounds' weight; and applying the same rule of construction to this act, I think that as the object of the legislature was to raise a sum of money to defray expences incurred for public purposes that the duty is payable under this act for every chaldron of coals brought within the limits of the town, whether it be brought in distinct parcels containing a less quantity than a chaldron or not.

1824.

MILLS
against
FUNNELL.

Rule discharged.

100 acres, and that *J. S.* was seised thereof in fee, and that the defendant as his servant, and by his express orders, took the gelding damage feasant. The plaintiff replied, *de injuria sua propria absque tali causa*; and it was held, that the replication was bad, because it put in issue three or four things. In this case the replication puts in issue the trading, the act of bankruptcy, and the petitioning creditor's debt, and therefore is bad.

1824.

O'BRIEN
against
SAXON.

Campbell, *contra*, was stopped by the Court.

Per Curiam. Those three facts connected together constitute but one entire proposition, and therefore the replication is good. In *Crogate's* case, 8 Co. 132., it is laid down, that the general replication, *de injuria sua propria*, is proper, when the defendant's plea consists of matter of excuse, and of no matter of interest whatever. Here the plea consists of matter of excuse only. In *Robinson v. Rayley* (a), the defendant in trespass pleaded a right of common for his cattle, *levant and couchant*. The plaintiff replied, that they were not his own commonable cattle *levant and couchant*. The defendant demurred specially, because the replication was multifarious; but the Court held the replication good, the rule being, not that issue must be joined on a single fact, but on a single point, and that it was not necessary that this single point should consist only of a single fact; and Lord *Mansfield* says, "Here the point is, the cattle being entitled to common: this is the single point of the defence; but in fact they must

(a) 1 Bur. 316.

run and flowed, and still of right ought to run and flow, unto and past the lands and premises of the plaintiff, for supplying the same with water; yet the defendant, well knowing the premises, but contriving, &c., heretofore, and whilst the plaintiff was possessed of the tenements, with the appurtenances, to wit, on, &c., at, &c., wrongfully and injuriously erected and made a certain pent-stock, dam, or floodgate, in and across the said stream, higher in the said stream than the tenements of the plaintiff, and wrongfully and injuriously widened and enlarged a certain other pent-stock, dam, or floodgate, then being in and across the said stream, higher in the said stream than the lands and premises of the plaintiff, and kept and continued the said first-mentioned pent-stock, dam, or floodgate so erected and made, and the said other pent-stock, dam, or floodgate so widened, enlarged and altered respectively, in and across the said stream, for a long space of time, to wit, from thence hitherto and thereby unlawfully and wrongfully prevented the water of the stream from running and flowing along its usual and regular course, and in its usual calm, moderate, and smooth manner, unto and past the lands and premises of the plaintiff, as the same otherwise would have done, and thereby the water of the stream ran and flowed in a different direction or channel, and with much greater force and increased violence and impetuosity, unto and against the banks and premises of the plaintiff, and undermined, washed away, damaged, and destroyed the banks of the lands of the plaintiff, &c. The second count stated, that the defendant wrongfully and injuriously stopped, hindered, and prevented the water of the stream from running or flowing unto and past the tenements of the plaintiff, along its usual or regular

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Marryat and *Bolland* were to have shewn cause, but the Court called upon

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Chitty, in support of the rule. The jury have found, that the defendant ought not to stop the water from coming in summer to the plaintiff's premises. The stoppage of that water of itself is an injury, although no actual pecuniary damage ensue. In trespass to land it is not necessary to prove any actual damage; and if special damage be alleged, it need not be proved. Here the second count stated, as the ground of complaint, that the defendant wrongfully prevented the water from coming to the plaintiff's premises; that of itself constituted an injury, and then it was unnecessary to prove the special damage alleged; and therefore the plaintiff is entitled to the verdict.

BAYLEY J. I think that this rule ought to be discharged. My judgment in this case is founded on the nature of flowing water, and the manner in which an exclusive right to it is obtained. Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now if this be the true character of the right to water, a party complaining of the breach of such a right ought to shew that he is prevented from having water which he has acquired a right to use for some beneficial purpose. Here the declaration states a right to the use of this water at all times; but still, if the

cient for the purposes of working their mill. The plaintiff afterwards erected premises lower down the stream, and appropriated to himself the surplus water for the use of his works. Four years after the plaintiff had erected his works, the defendants widened their sluice, so that nearly double the quantity of water was drawn from the stream, and the plaintiff's works were thereby materially impeded. It was held in that case, that although the defendants might originally have appropriated the whole water to themselves, yet they could not do so after the plaintiff had appropriated the residue of the unappropriated water to himself. If the plaintiff, therefore, in this case, had shewn in his declaration a right to the unappropriated water of the stream, and had alleged as the ground of his complaint that he had been deprived of the use of that surplus water, he might then have been entitled to a verdict. But the present declaration is framed to meet a different case from that now relied upon. The gravamen of the complaint is not that the water was prevented by the act of the defendant from coming down to the plaintiff's premises, and that he was injured by the want of water, but that it, in fact, flowed in a more impetuous manner, and thereby damaged the plaintiff's banks; but the jury have found that no damage has been done to the plaintiff's bank, by the manner in which the water was caused to flow by the act of the defendant. The jury have, therefore, found against the plaintiff in respect of the right of action which he claims. The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover, he should shew the loss of
some

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actual loss of the water. The jury have found that he has not sustained the damage alleged; and, therefore, they have negatived the ground of action stated in his declaration. Water is of that peculiar nature, that it is not sufficient to allege in a declaration, that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of the water. The mere right to use the water does not give a party such a property in the new water constantly coming, as to make the diversion or obstruction of the water, per se, give him any right of action. All the king's subjects have a right to the use of flowing water, provided that, in using it, they do no injury to the rights already vested in another by the appropriation of the water.

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from the residue of the said down or common, with the hedges and fences in the declaration mentioned, so that defendant could not have his common of pasture. Replication joined issue upon the plea of not guilty, and then as to the trespasses committed in one of the closes in the declaration mentioned, nolle prosequi. And as to the trespasses committed in the other close, that the said last mentioned close in the declaration mentioned, *in which, &c.* at the said several times when, &c. was and is a certain close known by the name of *Burgey Cleave Garden*; and that the same close in which, &c. continually for thirty years and more, had been separated, divided, and inclosed from the said down or common called *Frentishoe* down, and occupied and enjoyed during all that time, in severalty and adversely to the said *E. Fosse*, and to all those whose estate she had in the messuage and land with the appurtenances in that plea mentioned; and to her, and their tenants and farmers, occupiers of the said messuage and land with the appurtenances, and to all persons claiming under them: and without the exercise and enjoyment during that time of the said supposed common of pasture in that plea mentioned by the said *E. Fosse*, or those under whom she claims title to the said messuage and land with the appurtenances, her, or their farmers or tenants, or any of them, for or relating to the supposed common of pasture. And this, &c. Rejoinder, that the said last mentioned close in which, &c. had not been, and was not, occupied or enjoyed during the time in the said replication mentioned, in severalty or adversely to the said *E. Fosse*, and to all those whose estate she had and hath in the said messuage and land with the appurtenances in that plea mentioned; and to her and

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Rule discharged.

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the evidence was, that the part enclosed, and held in severalty upwards of thirty years, was generally known by the name of *Burgey Cleave Garden*, although that name attached also to the other part subsequently enclosed. The plaintiff, therefore, had proved the issue in terms, that *Burgey Cleave Garden* has been enclosed and held in severalty thirty years. It is true, that in *Harcke v. Bacon* (a) it was held, that if it is alleged that a close called A. has been separated and enclosed from a waste for twenty years, to support the allegation it is necessary to prove that every part of the close has been so long enclosed. That case, however, was expressly decided upon the ground, that "it did not differ from the common case of pleading *liberum tenementum*, where, if the defendant proves he has a single acre in the vill, the issue is with him, whatever quantity of land the plaintiff may have there, and if the plaintiff had meant to dispute the particular spot, he should have newly assigned." But that decision has since been completely overturned by the decision of this court, in *Cocker v. Crompton* (b), in which it was held that where, in trespass *quare clausum fregit*, the plaintiff names the close in his declaration, and the defendant pleads, *liberum tenementum*, generally, without giving any further description of the close, the plaintiff is not driven to a new assignment; but is entitled to recover upon proving a trespass done in a close in his possession, bearing the name given in the declaration, although the defendant may have a close in the same parish known by the same name. They also cited *Stevens v. Whistler* (c), as shewing that where

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(a) 2 Taunt. 156.

(b) 1 B. & C. 489.

(c) 11 East, 51.

years and more it had been separated from the common, &c.; the words, “the close in which, &c. in the declaration mentioned,” confines that allegation to that spot where the trespass was committed; then it becomes a question of fact, whether the trespass was committed in that part of *Burgey Cleve Garden*, which had been enclosed and enjoyed in severalty for upwards of thirty years. That question has been submitted to the jury, and they have found that the trespass was not committed in any part of *Burgey Cleve Garden*, which had been enclosed and held in severalty for thirty years; it was, therefore, made out in proof, that the place in which the trespass was committed had not been occupied and enjoyed during the time, in the replication mentioned, in severalty or adversely, and that being so, the verdict is properly entered for the defendant.

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BAYLEY J. It appears from the evidence, that *Burgey Cleve Garden* consisted partly of land which had been enclosed upwards of thirty years, and partly of land which had not been enclosed so long. The name of *Burgey Cleve Garden* attached on each part of the enclosure, and it is contended that the pleadings are so framed as to entitle the plaintiff to a verdict, by proving that the trespass was committed on either part of the enclosure. The jury, by their verdict, have found that the trespass was committed in that part of the land which had not been enclosed thirty years. Then the point to be considered is, what question of fact do these pleadings raise? The defendant pleads, that he had a right of common over *Frontishoe Down*, of which the closes in which, &c. until the wrongful separation thereof, were parcel, and then justifies the breaking and entering the closes, because the closes in

this case the jury have found a trespass to have been committed only in that part of the close which had not been inclosed thirty years. They have therefore found in effect, that the place where the trespass was committed had not been inclosed and held in severalty upwards of thirty years, and that being so the verdict is properly entered for the defendant.

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HOLROYD J. I am of opinion that there is no ground for disturbing this verdict. It appears clearly from the evidence, and from the finding of the jury, that the trespass was committed in that part of *Burgey Cleve Garden* which had not been enclosed and held in severalty for thirty years. Upon the merits, therefore, the defendant is entitled to a verdict, unless he is fettered by the peculiar form of the pleadings. Now, the allegation in the replication, that the close in which, &c. was a close called by the name of *Burgey Cleve Garden*, may be considered either as an entire allegation, including the whole of *Burgey Cleve Garden*, or a divisible allegation, confined to that part of *Burgey Cleve Garden* in which the trespass was committed. It is clear that it must be taken to include that spot upon which the trespass was committed, for otherwise the replication would be bad. Now, if the allegation extends to the whole of *Burgey Cleve Garden*, then the plaintiff has alleged in pleading, and was bound to prove that the whole of *Burgey Cleve Garden* had been enjoyed and held in severalty for thirty years. If it be a divisible allegation, and confined to that part in which the trespass was committed, then it raised a question of fact for the jury, upon the evidence whether that part of the garden, in which the trespass was committed, had been occupied and enjoyed for thirty years, in severalty,

a demise of the entirety by *Thomas Herbert, James Southern*, and *Ann* his wife (in right of the said *Ann*) and *William Duke*, the 1st of *January*, 1821; secondly, on the demise of an undivided third by *Thomas Herbert*, same day; thirdly, on the demise of an undivided third by *James Southern* and *Ann* his wife (in right of the said *Ann*) same day; fourthly, on the demise of an undivided third, by *William Duke*, same day. Plea, general issue. At the trial before *Abbott C. J.*, at the *Middlesex* sittings after last *Easter* term, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case:

Thomas Herbert being seised in fee of the premises in question, made his will, duly executed and attested, so as to pass real estates, containing as follows, inter alia. "I give and devise unto my said son, *George Herbert*, two freehold houses in *Burdett's-buildings, Hoxton*, in the parish of *St. Leonard's, Shoreditch*, aforesaid, in the occupation of *William Ames* and *Tabitha Kenner*, also, &c. (certain other premises particularly described in the will,) to hold to him, my said son *George*, for and during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son *George*, lawfully to be begotten, and their heirs for ever, to hold as tenants in common and not as joint tenants. But if my said son *George* should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue; then I give and devise the same estates unto my said son *Thomas*, my daughter *Ann Southern*, and my son-in-law, *William Duke*, and their heirs for ever, to hold as tenants in common, and not as joint tenants." After the death

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but must be an executory devise, *Pells v. Brown* (a), *Doe v. Webber*. (b) But, secondly, it may be contended that the children of *George* would take an estate tail, for although the devise is to them and their heirs for ever, yet as the estate is afterwards devised over in the event of their dying without issue, that reduces their interest to an estate tail, *Doe v. Reason*. (c) Besides, as the ultimate remainder is to persons who would be heirs general to the children, they would never die without heirs as long as those persons lived. This case is therefore different from *Loddington v. Kime* (d) and *Goodright v. Dunham*. (e) [Bayley J. But here you must read the devise, "if the children should die before twenty-one, and without issue," otherwise the remainder over will be too remote.]

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Campbell, contra, was stopped by the Court.

BAYLEY J. There are two modern cases which are quite decisive of the present question, *Doe v. Burn-sall* (f) and *Crump v. Norwood*. (g) The present question arises upon a will, whereby the property was given to the testator's son, *George Herbert*, for life, and from and after his decease, to all and every the child and children of *George* and their heirs for ever; but if *George* should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then to the lessors of the plaintiff, two of

(a) *Cro. Jac.* 590.(c) Cited in *Doe v. Holmes*, 3 *Wils.* 244.(e) 1 *Doug.* 264.(g) 7 *Taunt.* 362.(b) 1 *B. & A.* 713.(d) 3 *Lev.* 431.(f) 6 *T. R.* 30.

whom

determinable was vested in that child, and the remainder over could only operate by way of executory devise. The other cases which I have mentioned are not in substance distinguishable from this; *Doe v. Burnesall* was a devise to *Mary Oustwhick*, and the issue of her body as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving any lawful issue of their bodies, then over. *Mary Oustwhick* suffered a recovery, and died without having had any issue, and it was held that all the limitations subsequent to that to her were contingent, and destroyed by the recovery. No question was raised as to ultimate remainder operating by way of executory devise, but that could not be raised, as *Mary Oustwhick* never had any issue in whom the first remainder might vest. But *Crimp dem. Woolley v. Norwood* is on all fours with the present case. There the devise was to the testator's wife for life, if she should so long remain unmarried, and immediately after her decease or marriage, to testator's three nephews, share and share alike, for life, as tenants in common, remainder to the heirs of their bodies respectively in fee; if more than one, then to all equally, as tenants in common; "and if any of his said nephews should die, leaving no such issue, or leaving any such they should all die without attaining the age of twenty-one years, then over;" and it was held, that the remainders, subsequent to the devise to the nephews, were contingent, and defeated by the destruction of the particular estate. And one of the nephews having died without having had issue, *Gibbs C. J.* considered that in that event the question of executory devise did not arise; although if there had been issue, the

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pened, and upon that the remainder over would, if at all, take effect as a contingent remainder. But the particular estate having been previously destroyed, the contingent remainder was thereby defeated.

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LITLEDALE J. The principles applicable to this case were fully considered in *Crump v. Norwood*, which cannot be distinguished from it. *Doe v. Burnsall* is also in point. It is true, that in that case the words were "if all such issue should die under twenty-one *and* without issue;" but here the word *or* must be read *and*; and although the point of the executory devise was not there agitated, yet Gibbs C. J. thought it an express authority for his judgment in *Crump v. Norwood*, where it was raised. Upon these authorities it seems to me clear, that the lessors of the plaintiff cannot recover.

Judgment for the defendant. (a)

(a) See *Hasker v. Sutton*, 1 Bing. 500.

It was afterwards discovered that *Thomas Herbert* was heir at law of the testator, and a fresh ejectment was brought, the Court having refused to grant a new trial in this case.



young thereof as aforesaid, did theretofore, to wit, on, &c. at, &c. and on divers other days and times, between, &c. wrongfully and unjustly cause divers guns, loaded with gunpowder, to be discharged near to the said close of the plaintiff, and with the noise of the discharges of the said guns, and the smell of the said gunpowder, did disturb, terrify, and drive away divers rooks, then being in or near the said close and trees of the plaintiff, inso-much that divers, to wit, 1000 rooks, which before that time had been used and accustomed to resort and come to the said trees, and to settle, build nests, breed and rear young in and upon the said trees, flew away and abandoned the said close and trees, and the nests built therein, and wholly forsook the same: and divers, to wit, 1000 other rooks which were then about to resort to, and settle in and upon, the said close and trees, were thereby prevented from so doing; whereby the plaintiff hath been from thence, hitherto, and still is prevented from killing and taking rooks, and the young thereof, in such plenty as he otherwise might and would have done, and thereby the plaintiff hath lost and been deprived of the profits and advantages which might, and otherwise would, have accrued to him therefrom, to wit, at, &c. Second count, that the plaintiff was possessed of a certain dwelling-house, and certain closes of land adjacent thereto, with a certain vivary, called a rookery, in and upon one of the said last mentioned closes, situate, &c. to which said rookery divers great numbers of other rooks had been, and were used and accustomed to resort and come, and to build nests, abide, breed, and rear their young in the said rookery, by means whereof the plaintiff was used and accustomed to derive great profit and advantage from killing and taking the

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sittings in bank after *Hilary* term, and partly at these sittings. All the arguments and authorities cited are so fully considered and commented on in the judgment of the Court, that it is unnecessary to state them here.

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Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court, and after stating the pleadings proceeded as follows: The judgment in this case must be arrested if either of the counts is bad, because the damages have been taken generally on the whole declaration; but there does not appear to be any material difference between them. The plaintiff does not state any special right in him to have the rooks resort to his trees; he relies upon that general right which all the king's subjects have, and he describes the profit to arise to him, not from the eggs, but from killing the birds and their young. To maintain an action, the plaintiff must have had a right, and the defendant must have done a wrong. A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect any right of personal security or personal liberty, nor any property in possession or in action; and the question then is, whether there is any injury to any property the plaintiff had a special right to acquire. A man in trade has a right in his fair chances of profit, and he gives up time and capital to obtain it. It is for the good of the public that he should. But has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ*, where he is at no expence in enticing them to his premises, and where it may be at least questionable whether they will be of any

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jects of diversion, but constitute an article of food. In 2 *Inst.* 199. it is said, that the common law gave no way to matters of pleasure (wherein most men do exceed), for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a *park, chace, or warren*, without a licence under the great seal of the king, who is pater patriæ and the head of the commonwealth:" but in the same page it is said "that fish-ponds being a matter of *profit and increase of victuals*, any man may erect." And even with respect to animals *feræ naturæ*, though they be fit for food, such as rabbits, a man has no right of property in them. In *Boulston's case* (a), it was adjudged that if a man makes coney burrows in his own land, which increase in so great number that they destroy his neighbour's land, his neighbours cannot have an action on the case against him who made the said coney-boroughs; for so soon as the conies come on his neighbour's land, he may kill them, for they are *feræ naturæ*, and he who makes the coney-boroughs *has no property in them*, and he shall not be punished for the damage which the conies do in which he has no property, and which the other may lawfully kill; and *Walmsley J.* says, "that the property of the conies is not in any man, nor can any man so keep them but that they will break out of themselves, which is the reason that none can have them in his own land, unless *by grant from the king or by prescription*; if otherwise, he is punishable in a *quo warranto*, for the queen had the royalty in such things, whereof none can have any property." *Manwood* in his *Forest Law*, p. 148. ss. 43, 44. takes notice of this power. It is stated to

(a) 5 Co. 105. Cr. J. Eliz. 547.

which are referred to in that case. In the course of the argument *Doddridge J.* says, “that if pigeons come upon my land I may kill them, and the owner has not any remedy, provided they be not taken by any means prohibited by the statute.” And to this *Croke* and *Houghton Js.* agreed; but *Montague C. J.* “held that the party had *jus proprietatis* in them, for they are as domestics, and have *animum revertendi*, and ought not to be killed, and for the killing of them an action lies;” but the reporter adds, the other opinion is the best. Trespass will lie for breaking a dove-cote; and in *Arnold v. Jefferson* (a) it is said, “that a lord of a manor may erect a dove-cote upon his land, parcel of his manor, and this he may do by virtue of his right as lord thereof; but that a tenant cannot without licence, for he can have no right to any privilege which may be prejudicial to others; but this is not a common nuisance, nor punishable in the leet. But the nuisance being particular, the lord shall have an action on the case, or an assize of nuisance, as he may for building a house to the nuisance of his mill.” These authorities shew, that with respect to rabbits and doves, which may be injurious to the lands of others, generally speaking, a party has not a right to keep them even in his own lands, except by the king’s licence, or unless he can shew a title by prescription, which supposes a grant. The reason given for requiring the grant is, that such animals are *nullius in bonis*, and no man can appropriate them to himself (b), and for the same reason, none can make a park, chase, or warren without the king’s licence. That being the law with respect to birds and animals whose habits are less destructive than those of

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(a) 3 *Salk.* 248.(b) See *Case of Monopolies*, 11 *Co.* 87.

rooks,

thereof, that they make
covertares of thatched
other such like; so that
in certain years past, the
struction of corn and
the tillers and sowers of
every person having any
shall do as much as it
stroy all choughs, crow
breeding, or haunting
grievous amerciaiment.
every parish shall, for te
choughs, crows, and roo
lawful day such nets at
tenants are for ten years
the houses, &c. and con
best possible to destroy
choughs, crows, and roo
20s. every year they sha
"any person minding
crows, and rooks, may,
occupier where they ha
away all such rooks, &c

revives the provisions in the 24 *H. 8. c. 10.*, as to the keeping of nets for choughs, crows, or rooks, but repeals all the other branches of that statute. It also provided, that in every parish sums should be raised for the destruction of noyful fowl and vermin: and for the heads of three old crows, choughs, pies, or rooks, or of six young ones, or for six eggs, is to be given a penny, and different sums for other different things. This statute was temporary, and was suffered to expire, but it was not repealed. It is not to be concluded, therefore, that the legislature altered their opinion as to the nature of these birds, and they may now be considered to be of the description the statutes 24 *H. 8. c. 10.* and 8 *Eliz. c. 15.* give them, viz. birds of destruction, and noyful fowl. It is not alleged upon this declaration that rooks are an article of food. At all events they are not so much so as rabbits. They certainly answer the description of animals *feræ naturæ*. They are not protected by any statute, but on the contrary have been declared by the legislature to be a nuisance to the neighbourhood where they are. That being so, it is quite clear no person can claim a right to have them resort to his lands, nor can any person become a wrong doer by preventing their so doing. *Keeble v. Hickeringill*(a) bears a stronger resemblance to the present than any other case, but it is distinguishable. There it was decided, that an action on the case lies for discharging guns near the decoy pond of another, with design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl are frightened away and the owner damnified. But in the first place it is observable, that wild fowl are protected by the statute 25 *H. 8. c. 11.*; that they

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(a) 11 *East*, 574. n.

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constitute a known article of food, and that a person keeping up a decoy expends money and employs skill in taking that which is of use to the public. It is a profitable mode of employing his land, and was considered by Lord *Holt* as a description of trade. That case, therefore, stands on a different foundation from this. All the other instances which were referred to in the argument on the part of the plaintiff, are cases of animals specially protected by acts of parliament, or which are clearly the subject of property. Thus hawks, falcons, swans, partridges, pheasants, pigeons, wild ducks, mallards, teals, widgeons, wild geese, black game, red game, bustards, and herons, are all recognised by different statutes as entitled to protection, and, consequently, in the eye of the law, are fit to be preserved. Bees are property, and are the subject of larceny. Fisheries are totally different. The fish can do no harm to any one, and constitute a well known article of food. Upon the ground, therefore, that the plaintiff had no property in these rooks, that they are birds *feræ naturæ* destructive in their habits, and not protected either by common law or statute, and that the plaintiff is at no expence with regard to them, we are of opinion that the plaintiff had no right to insist upon having them in his neighbourhood, and that he cannot maintain this action. The rule for arresting the judgment must therefore be made absolute.

Rule absolute.

1824.

KENWORTHY *against* SCHOFIELD.

SPECIAL assumpsit against the defendant, for not taking away a carding engine, purchased by him at an auction, agreeable to the conditions of sale, (which were set out,) in consequence whereof it was resold at a loss. Plea, non assumpsit. At the trial before *Holroyd J.*, at the *Lancaster* Summer assizes, 1823, it appeared that the engine in question was put up to sale by auction, among a variety of other things; the sale was subject to certain conditions, which were read by the auctioneer before the biddings commenced, but they were not attached to the catalogue or referred to by it. One *Luke Winterbottom*, as agent for the defendant, was the highest bidder for the engine, and it was knocked down to him, and the auctioneer wrote his name and the price, 105*l.*, against that article in the catalogue. For the defendant it was objected, first, that the statute of frauds was not satisfied by writing down the name of the agent of the purchaser: secondly, that the conditions of sale were part of the bargain, and not being annexed to the catalogue the signature to the latter did not amount to a signature of a note or memorandum of the bargain, within the meaning of the 17th section of 29 *Car. 2. c. 3.* The learned judge overruled the first objection, but reserved the second point, and the plaintiff having obtained a verdict, *Cross Serjt.*, in *Michaelmas* term, obtained a rule nisi for a nonsuit or a new trial; against which

At a sale of goods by auction, certain conditions of sale were read before the biddings commenced, but were not attached to the catalogue. An agent for the defendant was the highest bidder for a lot, and the auctioneer put down the price 105*l.*, and the agent's name opposite that lot, in his catalogue: Held, that sales of goods by auction are within the 29 *Car. 2. c. 3. s. 17.*, and that no sufficient memorandum of the bargain was signed to satisfy that section, the conditions of sale not being annexed to the catalogue. Had they been annexed, it would have sufficed to put down the agent's name, that of his principal not being necessary.

J. Williams now shewed cause. The second question now before the Court is certainly very important, as it respects the validity of all sales by auction. The first objection was overruled at the trial and it appears by

Phillimore



1824.

 KENWORTHY
 against
 SCHOFIELD.

BAYLEY J. It has been decided by many cases, that in sales of land by auction the auctioneer is agent for both the vendor and vendee, and that such auctions are within the statute of frauds. *Walker v. Constable* (a), *Emmerson v. Heelis* (b), *White v. Proctor* (c), *Kemeys v. Proctor*. (d) Now, the language of the seventeenth section of the statute of frauds, relating to sales of goods, is in substance the same as that of the fourth section, relating to sales of land. The only difference being, that the latter speaks of an *agreement*, the former of a *bargain*. The word *bargain* means the terms upon which parties contract, and it appears by *Saunderson v. Jackson* (e) that in order to satisfy the statute the signature must either be to some written document, containing in itself the terms of the bargain, or connected with some other document which does. Then comes *Hinde v. Whitehouse*, in which Lord *Ellenborough*, after time taken for consideration, delivered it as his opinion, that an auctioneer had not satisfied the requisitions of the statute by signing the name of the purchaser to the catalogue, that not being connected with, or referring to, the conditions of sale. In the present case nothing was said at the time when the engine was put up, as to the terms upon which the sale was to proceed. The very mischief contemplated by the statute might occur in such a case as this. There is abundant room for fraud and perjury, respecting the conditions of sale. Inasmuch, therefore, as there was not any memorandum of the terms of the bargain, signed by the parties, I think that the case is within the 29 Car. 2. c. 3. s. 17., and that a nonsuit must be entered.

(a) 1 B. & P. 306.

(b) 2 Taunt. 38.

(c) 4 Taunt. 209.

(d) 3 V. & B. 57.

(e) 2 B. & P. 238.

HOLROYD

AN
INDEX
TO THE
PRINCIPAL MATTERS.

ABATEMENT.

See PLEADING, 43. PRACTICE, 17.

ACTION ON THE CASE.

1. Where a lease of premises described them as abutting on "an intended way of thirty feet wide;" which was not then set out, and the soil of which was the property of the lessor; and an under lease was granted, describing the premises as "abutting on an intended way," not mentioning the width: Held, that the under lessee was entitled to a *convenient* way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained. The under lease was of premises, "together with all ways thereunto appertaining." A right of way over the original lessor's soil would not pass by those words. Per *Holroyd J. Harding v. Wilson*, T. 4 G. 4. Page 96
2. In case for obstructing the plaintiff's ancient windows, it appeared that the plaintiff and defendant had premises adjoining each other; the plaintiff's house was about four

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ACTION ON THE CASE.

- feet within the boundary of her premises. Some witnesses had known it for thirty-eight years, and during all that time there had been windows looking towards the adjoining premises. For a long series of years before the defendant purchased them, those premises had belonged to a family living at a distance, and it was not proved that any member of that family had ever seen them, and they had been occupied by the same tenant for the last twenty years. About two years before the action brought, defendant purchased them and built a house, thereby darkening the plaintiff's rooms: Held, that the circumstance of plaintiff's house not being at the extremity of her premises, did not affect the question, and that after an enjoyment of thirty-eight years, in the absence of any contradictory evidence, the windows were to be considered as ancient windows, and that plaintiff consequently was entitled to recover. *Cross v. Lewis*, E. 5 G. 4. Page 686
3. It is a good defence to an action for a malicious arrest, that the defendant

S Q



ANCIENT LIGHTS.

ADMIRALTY COURT.

The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrong doer, and to deliver it to the rightful owner; and, therefore, where it appeared upon a rule nisi for a prohibition to restrain the admiralty court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants, and the latter had not pleaded any title, the Court discharged the rule for a prohibition. *In the Matter of Blanshard and Others*, T. 4 G. 4. Page 244

ADVOWSON.

See SIMONY.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 13.

AGREEMENT.

See ASSUMPSIT, 5. PARTNERSHIP, 2.

ALIEN.

Children born in the United States of America since the recognition of their independence, of parents born there before that time, and continuing to reside there afterwards, are aliens, and cannot inherit lands in this country. *Doe d. Thomas and Frances Mary, his Wife, v. Acklam*, E. 5 G. 4. 779

ANCIENT LIGHTS.

See ACTION ON THE CASE, 2.

ANNUITY.

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ANNUITY.

1. The memorial of an annuity must contain the Christian name of the subscribing witness to the securities. The initial of the Christian name is not sufficient. *Chick v. Jefferies*, T. 4 G. 4. Page 1
2. It was agreed between the grantor of an annuity and the grantee that the latter should advance a specific sum of money upon annuity, (to yield to the grantee 7 per cent. per annum,) secured upon landed estates, of which the grantor was tenant for life, and that for securing the sum advanced, certain policies of assurance already effected on his life, should be assigned to the grantee. The annual premiums of these policies were considerably less than those which would have been payable if new policies had been effected. The amount of the annuity then payable was fixed at a sum composed of 7 per cent. upon the principal sum advanced, and the amount of the annual premiums payable on the policies to be assigned; and in the deed of grant this was stated to be the annuity granted. The policies were assigned by a separate deed, and there was a stipulation in it that they should be re-assigned to the grantor whenever he redeemed the annuity. In the memorial, the principal sum advanced was stated to be the consideration paid, and the annuity to be the annual payment reserved by the deed, but the assignment of the policies was not mentioned: Held that it was not necessary to mention the latter deed in the memorial, and that the principal sum advanced was properly stated to be the consideration paid for the annuity. *Morris v. Jones*, T. 4 G. 4. 232

3. In the memorial of an annuity, 3 Q 2 enrolled

applies only to annuities granted for pecuniary consideration, and therefore where by marriage settlement 10,000*l.* was to be paid by the father of the wife to trustees upon trust to pay the interest to the husband for life; and the father died without having paid the principal to trustees, and his affairs being embarrassed, and it being uncertain whether there would be sufficient to pay his debts, the husband agreed to accept in lieu of the 10,000*l.*, 5000*l.* and an annuity of 125*l.* payable during his life: it was held, that such annuity granted by the executors of the father did not require to be enrolled by the statute 53 G. 3. c. 141. *Blake v. Attersoll*, 5 G. 4. 875

APPEAL.

1. By the eighth section of the general inclosure act, (41 G. 3. c. 109.) when complaints are made against public roads set out by a commissioner, he and a justice are to hear them, and *finally direct* what is to be done; and by the tenth section, private roads are to be set out, subject to the same provisions as are contained in the eighth section respecting public roads. A private inclosure act, in which the general inclosure act was recited,

stituting the firm of a *London* banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the *London* bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the *London* bankers. It was the course of business between the two houses for the *London* bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the *London* bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the *London* bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time: Held, that the entries in the books of the *London* bankers did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and therefore that the *London* bankers, notwithstanding those entries, were entitled to

apply the payments received subsequently to the death of the deceased partner to the debt of the new firm. *Simson and Others v. Ingham and Others*, T. 4 G. 4.

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ARBITRAMENT.

1. The declaration stated that the plaintiff and defendant, by articles of agreement, (reciting that several actions, arising out of the same transaction, had been brought and defended by the plaintiff and defendant G. A. and D. A., and that in one of them the assignees of one J. T. a bankrupt recovered against the now plaintiff 2500*l.* and that disputes existed between the now plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and also concerning the proportion which each was to pay of the said sum of 2500*l.*, according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned,) submitted themselves to the award of J. T. J. R. and T. C. respecting the said matters. That the arbitrators taking the said matters into consideration, awarded that the defendant should pay the plaintiff 444*l.*; that five-eighth parts of the costs of the several actions before mentioned should be paid by the plaintiff, and three-eighths by the defendant; that the sums already expended by either of them should be allowed as part payment of his proportion; and that when the sum of 444*l.* and the costs were paid, mutual releases should be given. On demurrer: Held, that the plaintiff was entitled to recover; for that as to the first part of the award, nothing appeared on the



ranty in that particular. Held, that the action could not be maintained, the instrument first mentioned being void by the 34 G. 3. c. 68. s. 14. *Kain v. Old and Others, Executors*, H. 4 & 5 G. 4.

Page 627

11. In assumpsit for money had and received, it was proved that *Yarmouth* has been a borough from time immemorial, and that until the time of *Queen Anne*, the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By statute 1 *Ann. st. 2. c. 7.* all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed, which was done by charter in the following year. At a meeting duly holden before the defendant, then mayor, (he being by virtue of his office a justice of the peace) and another justice for granting and renewing the licences of publicans, the plaintiff applied to have his licence renewed, and upon having it done, was required to pay, amongst other fees, the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of sixty-five years: Held, first, that the defendant was not entitled to take any such fee; for the payment for sixty-five years did not raise a presumption that it had been immemorially paid to the bailiffs or mayor of *Yarmouth*, inasmuch as licences were not granted until the reign of *Ed. 6.*, and the defendant, as justice of peace, was not entitled to any fee for granting the licence. Secondly, that the defendant was not entitled under the 24 G. 2. c. 44. to notice of the action about to be brought against him, for that the fee could not have been taken by him as a jus-

tice, *colore officii*. Thirdly, that the payment was not voluntary, so as to preclude the plaintiff from recovering the money in this action. *Morgan v. Palmer, E. 5 G. 4.*

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ATTORNEY.

1. The attorney to a commission of bankrupt applied to the attorney of a mortgagee of premises belonging to the bankrupt to join in the sale of the mortgaged premises. The mortgagee having consented, her attorney requested the bankrupt's attorney to prepare, on the part of the mortgagee, requisitions to the commissioners of bankrupt, to ascertain the amount of principal and interest due upon the mortgage, &c. The latter did so. The sale did not afterwards take effect. In an action brought by the bankrupt's attorney against the mortgagee's attorney for the amount due for the business done, it was held that the question was properly submitted to the jury, whether the credit was given to the defendant; and the jury having found that it was, that the attorney was liable, although at the time when the business was done, it was known to be done for the benefit of the mortgagee. *Scrace, Gent., one, &c. v. Whittington, Gent, one, &c. T. 4 G. 4.* 11
2. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt subsequently to the issuing of the commission, to recover the amount of his bill. *Lambert v. Buckmaster. H. 4 & 5 G. 4.* 616
3. A communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter



due to the concern, passed to his assignees, being in the order and disposition of the bankrupt within the intent and meaning of the 21 Jac. 1. c. 19. s. 11. *Ex parte Enderby, in the Matter of Gilpin*, M. 4 G. 4. Page 389

4. An agreement between *A.*, a merchant, and *B.*, a broker, that the latter should purchase goods for the former, and, in lieu of brokerage, should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses, does not vest in *B.* any share in the property so purchased, or in the proceeds of it, although it may render him liable as a partner to third persons. *Smith and Another, Assignees v. Watson and Another*, M. 4 G. 4. 401

5. Where *A.* bought goods of a trader who had previously committed an act of bankruptcy, and paid for them bona fide without knowledge of the bankruptcy: Held, that the assignees under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 Jac. 1. c. 15. s. 14. *Cash and Another, Assignees, v. Young*, M. 4 G. 4. 413

6. A customer was in the habit of indorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid; and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the

amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson and Others v. Giles and Others, Assignees*, M. 4 G. 4. Page 422

7. Declaration in assumpsit by the assignees of a bankrupt, stated that the defendant was indebted to the bankrupt before his bankruptcy in 1000*l.* for goods sold, &c. and concluded by stating that the plaintiff had sustained damage to that extent. Plea, that before the bankruptcy upon an account stated between the bankrupt and the defendant, the latter was found to be indebted to the bankrupt in the sum of 400*l.*, for which said sum the bankrupt drew a bill upon the defendant, which the defendant accepted for and on account of the said several promises in the declaration mentioned, by reason whereof the defendant became liable to pay the bill. The plaintiff having replied over, it was held upon demurrer to the replication, that the plea was bad, inasmuch as it was pleaded to the whole of the demand, and the giving of a bill for 400*l.* was not in point of law a satisfaction of 1000*l.*, the amount of the debt claimed. *Thomas and Another, Assignees, v. Heathorn*, M. 4 G. 4. 477

8. *A.* and *B.* having been in partnership, dissolved it on the 14th of July, the dissolution was advertised on the 17th, on the 16th a bill was drawn in the names of *A.* and *B.* which was accepted and paid by *C.* without consideration; *C.* after-

mission, *Moody v. King and Porter*, H. 4 & 5 G. 4. Page 558

9. In an action for goods sold and delivered, brought by the assignees of A., against whom a commission of bankruptcy issued, on the petition of certain persons, who alleged that a debt was due to them as assignees of B. a bankrupt: Held, that the petitioning creditor's debt was sufficiently proved by the production of the proceedings under the commission, (no notice of an intention to dispute it having been given,) and that it was not incumbent on the plaintiffs to give any other evidence, that the petitioning creditors were the assignees of B. *Skaise, Assignee, v. Howard*, H. 4 & 5 G. 4. 560

By

10. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill. *Lambert v. Buckmaster*, H. 4 & 5 G. 4. 616

11. In an action by original, if the defendant does not appear, the bail-bond is forfeited on the quarto die post, the other four days being allowed merely *ex gratia*; and therefore where a commission of bankruptcy issued against one of the

on the face of it purported to bear date on the 31st : it was held to require only a stamp of 2s., which is imposed by 55 G. 3. c. 184. on bills for that sum, not exceeding two months after date. The word "date," as there used meaning the period of payment expressed on the face of the bill. *Upstone and Another v. Marchant*, T. 4 G. 4.

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2. A customer was in the habit of indorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid; and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson and Others v. Giles and Others, Assignees*, M. 4 G. 4. 422

3. In an action by the indorsee against the acceptor of a bill of exchange, whereof E. S. was the payee, the plaintiff proved that a person calling himself E. S. came to C., having in his possession the bill in question, and also a letter of introduction (proved to be genuine) which was expressed to be given

to a person introduced to the writer as E. S., and also another bill of exchange, drawn by the writer of that letter. The bearer of these documents, after remaining ten days at C., during which time he daily visited the plaintiff, indorsed to him the bill in question, and received value for it, and also a letter of credit: Held, that this was evidence of the identity of this person with E. S. the payee of the bill, &c. in the absence of any evidence in answer, sufficient to justify a verdict for the plaintiff. *Bulkeley and Others v. Butler, in Error*, M. 4 G. 4. Page 434

4. Declaration upon a bill of exchange drawn by the plaintiffs upon one F. W., indorsed by the plaintiffs to defendant, and re-indorsed by him to the plaintiffs. Averment, that at the time of the drawing of the said bill, and of the indorsement by the defendant to the plaintiffs it had been agreed between them that the name of the defendant should be indorsed upon the bill as a security to the plaintiffs for the due payment thereof by F. W., and that the bill was so indorsed by the defendant under such agreement, and for such purpose only, and that the plaintiffs took and received the bill in satisfaction of such debt of the said F. W., upon the faith that the defendant would indorse the same as such security, and that the indorsement by plaintiffs was made without any consideration, and for the purpose only of procuring the indorsement of the defendant, and making the bill negotiable. Averment, that the bill was presented to F. W., and that he refused to pay, and that notice of such refusal was given to the defendant, and he thereby became liable to pay, and being liable, promised: Held, upon demurrer, that this declaration was bad,

not maintainable, inasmuch as there was not any consideration for the defendant's indorsement *Brüten and Another v. Webb, M. & G. 4.*
Page 489

BOND.

1. A bond was given by country bankers to the several persons constituting the firm of a *London* banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the *London* bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the *London* bankers. It was the course of business between the two houses for the *London* bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the *London* bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the

it was not to operate as a deed until a given event happened.

It is not necessary in a declaration upon a post obit bond, to aver the death of the person upon whose death the money secured by the bond was to become payable.

A post obit bond (upon which a forfeiture has taken place) is not within the statute of the 8 & 9 W.3. c. 11.; and therefore it is unnecessary to suggest breaches.

Semble, That such a bond is within the 4 & 5 Anne, c. 15. *Murray, Administrator, v. The Earl of Stair*, T. 4 G. 4. Page 82

3. Debt on a bond conditioned for the performance of an award, to be made within a limited time. The declaration after setting out the condition, stated that before that time expired, the parties to the bond by deed agreed to give the arbitrators further time for making the award, and that an award was made within the extended time; and alleged non-performance: Held, upon demurrer that the action was maintainable upon the bond. *Greig v. Talbot*, T. 4 G. 4. 179

4. Debt on bond conditioned for the payment of money by instalments. Plea, that defendant by W., as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that W., as the agent of the defendant, voluntarily paid 500*l.* for differences against the form of the statute, and that for securing the repayment of that money to W., the defendant gave his promissory note to W., and that long after the same became due, W. indorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the

action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion, and for the purpose in the plea mentioned: Held, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given.

At the trial, it appeared in evidence, that the note was given to W. to cover a sum which he, as broker, was to pay for losses on stock-jobbing transactions: Held, that this evidence did not support the plea, which stated that the note was given to secure the repayment of money actually paid by W. *Amory and Another v. Meryweather*, H. 4 & 5 G. 4. Page 573

5. In an action by original, if the defendant does not appear, the bail-bond is forfeited on the quarto die post, the other four days being allowed merely ex gratia; and therefore, where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days, it was held that the penalty of the bond was a debt proveable under the commission, and therefore barred by the certificate. *Coulson, Assignee of the Sheriff of Middlesex, v. Hammon*, H. 4 & 5 G. 4. 626

BRIDGE.

See INDICTMENT, 1.

BROKER.

See PARTNERSHIP, 2.

CHAR-

the first mentioned ship at G., then the second charter should be void: Held, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not being attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. *Soames and Another v. Lonergan and Another*, H. 4 & 5 G. 4. Page 564

CHURCHWARDENS.

1. In the parish of A., two churchwardens were elected for the township of B., and two others for the rest of the parish. Separate rates were made for these divisions: Held, that the churchwardens elected for the township of B. might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants. *Astle and Another v. Thomas and Another*, M. 4 G. 4. 271
2. A parish certificate, purported to be granted in 1761 by A., the only

hawker, without any licence so to do: Held, that the conviction was in the proper sum. *The King v. Websdell*, T. 4 G. 4. Page 136

3. A person exposing to sale and selling tea as a hawker, without a licence, is liable to the penalty imposed by the 50 G. 3. c. 41. upon hawkers trading without a licence; although, even with a licence, he would be liable to a penalty for selling tea in an unentered place.

The defendant was convicted in a penalty of 10*l.*: Held, that it was the proper sum. *The King v. McGill*, T. 4 G. 4. 142

4. In a conviction under the 3 G. 4. c. 110., it is necessary that the offence should appear to have been proved on the oath of one or more credible witnesses, and therefore, where the conviction stated, "that R. A. was convicted of carrying brandy liable to seizure," (without saying upon oath) and proceeded, "and it is this day, in like manner, also proved, on the oath of J. H., that the brandy was taken from R. A., and that he was detained by an officer of the navy, &c.": Held, that carrying the brandy was the offence, and as that was not stated to have been proved on oath, the conviction was bad, and that R. A. (having been committed to prison), was entitled to be discharged. *Ex parte Aldridge*, H. 4 & 5 G. 4. 600

5. In an information on the 5 Ann. c. 14. s. 2. against a carrier between Norwich and London, for having game in his possession as carrier, it is not necessary to aver that the defendant is not a person qualified to kill game, nor that he had the game in his possession knowingly. The evidence for the prosecution was, that game was found in the defendant's waggon at an intermediate place between Norwich and London: Held, that
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there was sufficient *prima facie* evidence that the defendant had it in his possession as carrier. The evidence for the defendant was, that his book-keeper living at that place did not know of any game having been put in there. Neither the driver of the waggon nor his assistant was called as a witness: Held, that this evidence did not vary the case, and that the defendant was properly convicted of having the game in his possession as carrier. *The King v. Marsh*, E. 5 G. 4. Page 717

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An author publishes his work in a foreign country in 1814, and afterward agrees to sell to A. the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. A. publishes the work in September, 1814, in England. In 1818 B. publishes the same in England. In 1822, the author, by an agreement in writing assigns to A. the exclusive right of printing the work in England: Held, that A. did not, by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in England; secondly, that that could not be deemed a publication by the author, not being made on his account, or for his benefit: Held, thirdly, that the publication by B. in 1818 was a lawful publication; and, fourthly, that the author could not afterwards, in 1822, by making a valid assignment to A. enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed. *Clementi and Others v. Walker*, E. 5 G. 4. 861

2. By charter, a borough was constituted a body corporate, to have perpetual succession by the name of the mayor and free burgesses of the borough of F. Nine of the free burgesses were to be chosen aldermen. One of the aldermen was to be called mayor. The mayor and aldermen were to form the common council; a person learned in the laws of *England* was to be recorder. The charter then authorised the mayor and recorder, or their respective deputies, and the rest of the aldermen of the borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time, and at all times thereafter, as often, and when to them should seem fit and necessary, to nominate, choose, and prefer so many, and such persons to be free burgesses of the borough, as they pleased, and to those free burgesses so to be chosen, to administer an oath for their fidelity to the borough. Nine persons were nominated as the first aldermen, one person as recorder, and five persons the first free burgesses; and in case any one or more of the aldermen should die, or be removed from his office, the mayor, recorder, justices of peace,

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every court, to execute the duties of the office.

Quære, Whether he could have made such an appointment for the discharge of any particular ministerial duty? *The King v. Mayor, &c. of Gravesend*, H. 4 & 5 G. 4.

Page 602

4. The bailiff and burgesses of *Ilchester* (a corporation by prescription) had from time immemorial been lords of the manor of *Ilchester*, and as such had during all that time holden a court-leet for the manor, on certain days, in the guildhall of the borough, which was their property. In the 2 Ph. & M. they accepted a charter, which purported to grant to them a court-leet to be holden in the guildhall, as of ancient time had been used. By an award afterwards made in pursuance of a private act of parliament, "the manor of *Ilchester*, with the rights, members, courts, view of frank-pledge, &c. royalties, and appurtenances, (excepting to the bailiff and burgesses the guildhall, houses, buildings, court, or garden, belonging to the same, &c.)" were conveyed to Lord H.: Held, that although the exception retained in the bailiff and burgesses the property in the guildhall, yet the lord of the manor had a right to hold the court-leet there. *The King v. The Bailiff and Burgesses of Ilchester*, E. 5 G. 4. 764

COSTS.

See ARBITRAMENT, 1. 5. PLEADING, 11.

1. Where the plaintiff was discharged under the insolvent act, after issue joined, and before notice of trial given, the Court stayed the proceedings until the assignee, or some creditor of the plaintiff, should give

security for costs. *Heaford v. Knight*, H. 4 & 5 G. 4. Page 579

2. A certificate that a trespass was wilful to entitle plaintiff to his full costs under the 8 & 9 W. 3. c. 11. s. 4. need not be granted immediately after the trial of the cause. *Woolley v. Whitby*, H. 4 & 5 G. 4. Page 580
3. Where the defendants, in an indictment for misdemeanor, submitted to a verdict of guilty, upon an understanding that they were not to be brought up for judgment: Held, that the prosecutor was not entitled to costs, no agreement having been expressly made respecting them. *The King v. Rawson and Others*, H. 4 & 5 G. 4. 598
4. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt subsequently to the issuing of the commission, to recover the amount of his bill. *Lambert v. Buckmaster*, H. 4 & 5 G. 4. 616
5. A rule for setting aside an inquiry before the sheriff for excessive damages. The matter was referred, nothing being said about the costs of the application. The arbitrator by his award having reduced the damages, it was held, that the plaintiff was not entitled to the costs of the application. *Lewis v. Harris*, H. 4 & 5 G. 4. 620
6. A judge's certificate, under stat. 22 & 23 Car. 2. c. 9., may be granted within a reasonable time after the trial. *Johnson v. Stanton*, H. 4 & 5 G. 4. 621
7. Semble, that the Court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury. *Doe, dem. Rees, v. Thomas*, H. 4 & 5 G. 4. 622
8. By the statute 43 G. 3. c. 46. s. 3. costs are to be allowed to a defendant

an action for the same cause, and recovered a verdict. The costs in equity may be set off against the judgment, subject to the lien of the attorney. *Harrison v. Bainbridge*, E. 5 G. 4. 800

COUNTY RATE.

See RATE, 3.

COURT LEET.

See CORPORATION, 4. CUSTOM, 1.

COVENANT.

1. Plaintiff demised by indenture to *B.* (defendant's testator) certain premises to hold for eleven years, from the 29th September, 1809. *B.* covenanted, amongst other things, that he would not, *during the lease*, sell or convey away from the premises any of the straw which, during the *leased term*, should grow upon the premises, (except wheat-straw and rye-straw,) and that for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the *thereby leased term*, he (*B.*) would bring back a cart-load of dung; and plaintiff covenanted, that it should be lawful for *B.* to have the use of the barns, &c. for receiving his crops of corn and hay

cipal sum insured, from the expiration of six months after due proof of the death of *A.* *Higgins v. Sargent and Others*, *M. 4 G. 4.*

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3. By a deed of three parts between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds. Held, that this deed was legal and binding, and that a plea by the husband that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits charging her with adultery, and that a decree of divorce à mensa et toro was in that cause pronounced was not a sufficient answer to an action by the trustee for arrears of the annuity. *Jee, Clerk, v. Thurlow*, *H. 4 & 5 G. 4.* 547

4. Lessee, who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist, to shew that they were not intended to pass under the general words of the second demise.

Quære, whether any circumstances dehors the deed can be alleged to shew that they were not intended to pass?

Quære, whether lime-kilns erected for the purpose of trade are removable? *Thresher v. The East London Waterworks*, *H. 4 & 5 G. 4.*

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5. *A.* and *B.* (being owners of nine-sixteenth shares of a ship, and also husbands or managing owners,) by deed sold five-sixteenths to *C.* The deed contained a covenant that *C.* should be appointed to the command of the ship, and that *A.* and *B.* should continue to have the management, as husbands, and should elect the tradesmen and appoint all the officers; and that if *C.* should relinquish the command, or die, *A.* and *B.* should appoint such fit person to succeed him as might be approved of by him or his executors, or that he or they might nominate a fit person to the command in his stead, and that *A.* and *B.* should be employed as the agent of *C.* in the concerns of the ship; and if *C.* should be minded to sell all or any of his shares he might do so, upon condition that the purchasers should abide by the stipulations in the deed, and not remove *A.* and *B.*, or the survivor of them, from being managing owners, so long as they should perform the stipulations on their part: Held, that although the covenant to continue *A.* and *B.* as *C.*'s agents in the concerns of the ship might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipulation for the appointment to the command, and the continuance of the management, it was illegal and void. *Card and Cannan v. Hope*, *H. 4 & 5 G. 4.* Page 661

CUSTOM.

See POOR RATE, 1.

1. A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. A custom for the steward of a court-leet to nominate certain persons to the bailiff, to be summoned

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using in their dwellings flour produced from corn ground at other mills. *Richardson and Another v. Walker*, E. 5 G. 4. 827

3. Where the lord of a manor had two mills, and the tenants and residents were, by custom, bound to grind all their malt which they used in their dwellings, at the said mills, but might take it to either at their own option: Held, that the lord, having pulled down one of the mills, had thereby suspended the custom. *Richardson and Another v. Capes*. E. 5 G. 4. 841

DAMAGES.

See VENDOR AND VENDEE, 6.

DEBT ON BOND.

See BOND, 3.

DEED.

See COVENANT, 3. 5. STAMP, 3.

1. A. being seised in fee of the manor of F. and the demesne lands thereof, and of all the coalmines lying under the manor, enfeoffed C. D. of and in certain closes, except and always reserved to the feoffor, his heirs, and assigns, all tithes of corn and grain, and also except and always reserved

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DEVISE.

1. *A.* by will duly executed to pass real estates, devised and bequeathed to trustees, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever and wheresoever, in trust to pay thereout the several legacies and annuities therein by him given and bequeathed, and for other purposes in the will mentioned. The testator then gave legacies and annuities to a considerable amount; and directed that the annuities should be chargeable upon his 26,400*l.* in the 3 per cent. consolidated annuities. It was stated in the case that a large surplus remained after paying debts, legacies, and annuities; but it was not stated that the legacies were actually paid, or that the annuitants were dead. After the legacies and annuities, the testator proceeded, "All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or entitled to, at the time of my decease, I do give, devise, and bequeath unto my three nieces, *E. M.*, *M. M.*, and *C. M.*, equally to be divided between them, *share and share alike, for and during the term of their natural lives.* And from and after the decease of them or either of them, it is my will that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits *for life in like*

manner. And if either of my nieces shall happen to die in the lifetime of the others or other of them without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid shall go to and be shared and divided equally between, the survivors of my nieces for their respective lives, and afterwards by the lawful issue of the survivors of my nieces in like manner. And if all my nieces and their issue, save one, shall die without issue lawfully begotten, then such surviving niece shall have and enjoy the whole of the rents, &c. of such residue of my estate and effects for and during the term of her natural life. And from and after her decease, the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, &c. equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and to hold so much and such part or parts thereof as are freehold, to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint tenants; and if but one, then to such one, his or her heirs and assigns for ever. And if all my nieces shall die without issue, then from and after the decease of the survivor of them my nieces without issue as aforesaid, I give the whole of such residue to my next male heir of the name of *Murthwaits*, to hold to him, his heirs, executors, and administrators, in manner aforesaid." Two of the trustees were dead. All the nieces were still living; two of them had no children, the other had one child, a son, *G. B.*

Held, first, that *J. C.*, the surviving trustee,

the rents," &c., and the passage before those words had been omitted, the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

Fifthly, that *G. B.* would have no estate in the freehold or leasehold tenements; but should he survive the three nieces, and neither of them should have any other child, he would be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the lifetime of the three nieces, he would die seised of no freehold, nor possessed of any leasehold estate. *Murthwaite and Others v. Jenkinson and Others*, *M. 4 G. 4.*

Page 357

2. *A* being seised in fee of an estate called *H.*, subject to a mortgage for years, by his will (in which there was a statement in figures of the amount of the estimated value of his entire property, of the sum which his wife had brought him on his marriage, and of the sum which he himself had settled upon his marriage, and of the estimated value of the estate at *H.*) directed that his daughter *C. M.* should have the disposal of the sum which he himself had settled on his wife, and in case she did not dispose of it, that it was to go to

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DOWER.

or leaving issue, and such child or children should die before attaining the age of 21 years or without lawful issue, then I give and devise the same estates unto my son *T.*, my daughter *A. S.*, and my son-in-law *W. D.*, and to their heirs for ever as tenants in common and not as joint tenants." After testator's death *G.* suffered a recovery, and died unmarried and without issue: Held, that in that event the devise over must take effect if at all as a contingent remainder, and was therefore defeated by the destruction of the particular estate by the recovery. *Doe, dem. Herbert and Others, v. Selby, E. 5 G. 4.*

Page 926

DISTRESS.

1. The plaintiff's goods were distrained for poor rates, and upon the sale produced 4*l.* 7*s.* more than was necessary to satisfy the levy. The defendants tendered to him 3*l.* 14*s.* which he refused to accept, saying that it was too late, but did not then or at any other time demand a settlement of the account and the payment of the overplus: Held that the 27 G. 2. c. 20. prevented the plaintiff from recovering without making a demand before the commencement of the action, and that the tender did not make such demand unnecessary. *Simpson v. Routh and Others, E. 5 G. 4.*
2. Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized. *Willoughby v. Backhouse and Marshall, E. 5 G. 4.*

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DOWER.

A widow before assignment of dower has not such an interest in the

ESCROW.

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land of which she is dowable as to be irremovable from the parish in which the land lies. *Rees v. Inhabitants of North Weald Bassett, E. 5 G. 4.*

Page 724

DYING DECLARATIONS.

See EVIDENCE, 15.

EJECTMENT.

1. Where a lease contained a proviso that if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" Held, that the rent having been in arrear for the time specified, an ejectment might be maintained without actual re-entry, and without any demand of the rent. After trial the court will not relieve the tenant by staying proceedings in the ejectment upon payment of the arrears of rent and costs. *Doe, dem. Harris, v. Masters, M. 4 G. 4.*
2. Semble, that the Court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury. *Doe, dem. Rees, v. Thomas, H. 4 & 5 G. 4.*

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ELEGIT.

See PRACTICE, 4.

ESCROW.

A subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution it was agreed that it should remain in his (the subscribing witness's) hands until the death of *A. B.*, and until certain securities were given up, and

of *A. B.*, and until the notes were delivered up.

Semble, that it is not essential in order that an instrument should operate as an escrow only, that it should be expressly declared at the time when it is executed, that it was not to operate as a deed until a given event happened. *Murray, Administrator, v. The Earl of Stair, T. 4 G. 4. Page 82*

EVIDENCE.

1. Where a declaration against a sheriff for taking insufficient pledges in a replevin bond stated that the party replevying levied his plaint "at the next county court, to wit, at the county court holden on, &c. before *A., B., C.,* and *D.,* suitors of the court," which plaint was afterwards removed by re. fa. lo.; and by that record it appeared that the plaint was levied at a court holden before *E., F., G., H.* Held, that the variance was immaterial, for that it was unnecessary to state or prove the names of the suitors, and that they might be rejected as surplusage. *Draper v. Garratt, and Another, T. 4 G. 4.*
2. In an action by the assignees of a bankrupt who has obtained his certificate, and released the surplus of his estate. the bankrupt is -

to recover a quarter's rent due at Lady-day. *Bishop v. Howard*, T. 4 G. 4. Page 100

7. A libel imputed that his majesty laboured under mental insanity; and it stated that the writer communicated the fact from authority. Upon the trial of the information, the publication of the libel was proved. It was admitted by the defendants that the statement in the libel was untrue, and they did not offer any evidence to shew that they had any authority for making it; and the Judge in his charge to the jury having stated that it was a criminal act to assert falsely of his majesty or of any other person that he was insane, and it being admitted by the defendants themselves that the fact stated in the publication was false, in his opinion it was a libel: Held, that this direction was correct in point of law, and that the Judge was warranted in saying that the defendants had admitted the charge contained in the libel to be FALSE; for assuming that there might be a distinction between a mere untruth and a criminal untruth, and that the term "false" applied only to the latter, still as the defendants had stated that they communicated the fact from authority, and had not proved that they had any such authority, they must have been guilty of a criminal untruth or falsehood by stating as a fact the knowledge of which they had derived from authority that which was untrue, and for which they had no authority.

The jury having retired for a considerable time, returned into court, and desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the Judge answered, "The man who publishes slanderous matter calcu-

lated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can shew the contrary; and it is for him to shew the contrary:"

Held, that this answer was correct in point of law, and that the Judge was not bound to answer in the affirmative or negative the abstract question put to him; and assuming that a malicious intention is necessary to constitute a libel, that intention is to be inferred from the mischievous tendency of the publication itself, unless the defendant shews something to rebut such inference, and therefore that the publication of a libel of mischievous tendency having been proved, and the defendant not having shewn that he published it from authority, the jury were bound to find that he published it with a malicious intention. *The King v. Harvey and Chapman*, M. 4 G. 4. Page 257

8. In an action by the indorsee against an acceptor of a bill of exchange, whereof *E. S.* was the payee, the plaintiff proved that a person calling himself *E. S.* came to *C.*, having in his possession the bill in question, and also a letter of introduction (proved to be genuine), which was expressed to be given to a person introduced to the writer as *E. S.*, and also another bill of exchange, drawn by the writer of that letter. The bearer of these documents, after remaining ten days at *C.*, during which time he daily visited the plaintiff, indorsed to him the bill in question, and received value for it, and also a letter of credit: Held, that this was evidence of the identity of this person with *E. S.* the payee of the bill, &c. in the absence of any evidence in answer, sufficient to justify a verdict for

whole of that interest, but only a doubtful right to dispose of any portion of it, and the plaintiff averred that he put up his *said* interest to auction, and that defendant published a libel of and concerning his right to sell the *said* interest; the evidence being that he offered for sale a portion of that interest only: Held, that this was a fatal variance. *Millman v. Pratt*, M. & G. 4. 486

10. In an action for maliciously, and without probable cause, charging plaintiff with an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, and that he delivered them at the court of quarter sessions to the clerk of the peace or his deputy. The clerk of the peace stated that a bill of indictment for the assault was preferred, and that the grand jury returned *ignoramus*, that it was usual in such case to throw away or destroy the depositions; that he had searched among his papers, and could not find them: Held, that parol evidence of the contents was admissible; and that it was not necessary to call the deputy-clerk of the peace to shew that the original depositions were not in his possession, inasmuch as it was his duty, if he had received

them as assignees of *B.*, a bankrupt: Held, that the petitioning creditor's debt was sufficiently proved by the production of the proceedings under the commission (no notice of an intention to dispute it having been given), and that it was not incumbent on the plaintiffs to give any other evidence that the petitioning creditors were the assignees of *B.* *Skaife, Assignee, v. Howard, H. 4 & 5 G. 4.* Page 560

14. Debt on bond conditioned for the payment of money by instalments. Plea, that defendant by *W.*, as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that *W.*, as the agent of the defendant, voluntarily paid 500*l.* for differences against the form of the statute, and that for securing the repayment of that money to *W.*, the defendant gave his promissory note to *W.*, and that long after the same became due, *W.* indorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion and for the purpose in the plea mentioned: Held, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given.

At the trial it appeared in evidence, that the note was given to

W. to cover a sum which he, as broker, was to pay for losses on stock-jobbing transactions: Held, that this evidence did not support the plea, which stated that the note was given to secure the repayment of money actually paid by *W. Amory and Another v. Meryweather, H. 4 & 5 G. 4.* Page 573

15. Defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and on shewing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose: Held, that it could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration. *The King on the Prosecution of James Law v. William Mead, H. 4 & 5 G. 4.* 605

16. Where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others, with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect; the jury having found that it was true in all particulars, except that the eye was not knocked out: Held, that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea. *Weaver v. Lloyd, E. 5 G. 4.* 678

17. In case for obstructing the plaintiff's ancient windows, it appeared that the plaintiff and defendant had premises adjoining each other; the plaintiff's house was about four feet within the boundary of her premises. Some witnesses had known it for thirty-eight years, and during all that time there had been windows looking towards the adjoining premises. For a long series

the plaintiff's rooms: Held, that the circumstance of the plaintiff's house not being at the extremity of her premises, did not affect the question, and that after an enjoyment of thirty-eight years, in the absence of any contradictory evidence, the windows were to be considered as ancient windows, and that plaintiff consequently was not entitled to recover. *Cross v. Lewis*, E. 5 G. 4. Page 686

18. It is a good defence to an action for a malicious arrest, that the defendant, when he caused the plaintiff to be arrested, acted *bonâ fide* upon the opinion of a legal adviser of competent skill and ability, and believed that he had a good cause of action against the plaintiff. But where it appeared that the party was influenced by an indirect motive in making the arrest, it was held to be properly left to the jury to consider whether he acted *bonâ fide* upon the opinion of his legal adviser, believing that he had a good cause of action. *Ravenga v. Mackintosh*, E. 5 G. 4. 693

19. A communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a

laterally on the trial of the first appeal. *The King v. The Inhabitants of Knaptoft, E. 5 G. 4.*

Page 883

23. Where, in case a plaintiff alleged in his declaration that he was possessed of a messuage and premises, and by reason thereof entitled to the use of a stream of water running through the premises for supplying the same with water; and that defendant erected a certain dam higher up the stream, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff; and on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant; but added, that defendant had no right to stop the water in the summer-time; the Judge ordered the verdict to be entered for the defendant: Held, that the verdict was right, for flowing water is publici juris, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, and therefore, the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water. *Williams v. Morland, E. 5 G. 4.*

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24. Trespass for breaking and entering the plaintiff's close. Plea, prescribing in right of a messuage and land for a right of common of pasture on a down or common whereof the close, &c. before the wrongful separation thereof was parcel, and justifying the trespass, because the close in which, &c. was wrong-

fully enclosed and separated from the residue of the common. Replication, that the close in the declaration mentioned, in which, &c. was a close called *Burgey Cleave Garden*, and had for thirty years and more been separated, and divided, and enclosed from the common, and occupied and enjoyed during all that time in severalty and adversely to the persons holding the messuage and land, in respect of which the right of common was claimed. Rejoinder, that the close in which, &c. had not been occupied or enjoyed for thirty years or upwards in severalty or adversely to the person holding the messuage and land, in respect of which the right of common was claimed. The jury found that part of the garden had been enclosed within the thirty years, and that the alleged trespass was committed in that part of the garden only: Held, that upon this finding the defendant was entitled to the verdict, because the words of the issue, the close in which, &c. was either an entire or a divisible allegation; if it was an entire allegation, it comprehended the whole of the enclosure to which the name of *Burgey Cleave Garden* attached, and in that case the plaintiff was bound to prove that the whole of the garden had been enclosed upwards of thirty years; or if it was a dividable allegation, it was confined in its meaning to that spot in which the trespass had been committed; and the jury having found that that spot had not been enclosed thirty years, it was immaterial whether the rest had been so or not. *Richards v. Peake, E. 5 G. 4.*

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EXCEPTION.

See DEED, 1.

EXECUTION.

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out of the operation of that section. *Baldey v. Parker*, T. 4 G. 4.

Page 37

2. By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: Held, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other. *Phillips v. Bistolli*, M. 4 G. 4. 511

GAME.

See CONVICTION, 5.

HAMLET EXTRA-PAROCHIAL.

See HIGHWAY, 1.

HAWKER AND PEDLAR.

1. Since the passing of the 50 G. 3. c. 41., the manufacturer of goods is allowed to hawk them in those places only which are mentioned in the twenty-third section of that act.

The defendant was convicted in a penalty of 10*l.* for trading as a hawker, without any licence so to do: Held, that the conviction was in the proper sum. *The King v. Websdell*, T. 4 G. 4. 136

2. A person exposing to sale and selling tea, as a hawker, without a licence, is liable to the penalty imposed by the 50 G. 3. c. 41. upon

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hawkers trading without a licence; although, even with a licence, he would be liable to a penalty for selling tea in an unentered place.

The defendant was convicted in a penalty of 10*l.*: Held, that it was the proper sum. *The King v. M'Gill*, T. 4 G. 4. Page 142

HIGHWAY.

An indictment stated that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: Held, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair. *Quære*, Whether the inhabitants of the hamlet would be liable to repair at common law, if the indictment had contained the latter allegation. *The King v. The Inhabitants of Kingsmoor*, T. 4 G. 4. 190

HUNDRED, ACTION AGAINST.

Where the owner of certain stacks of hay and corn which were maliciously set on fire, received the amount of his loss from an insurance office: It was held that he might nevertheless maintain an action against the hundred, on the 9 G. 1. c. 22. *Clark v. Hundred of Blything*, M. 4. G. 4. 254

ILLEGAL CONTRACT.

See COVENANT, 5.

INCLOSURE ACT.

By the eighth section of the general inclosure act, (41 G. 3. c. 109.)

§ 8

when

general inclosure act was recited, gave an appeal in all cases, (except as to such acts, determinations, and proceedings of the said commissioner as were by the said recited act, or that act directed to be final, binding, and conclusive.) The commissioner under that act having set out a private road which was objected to, he and a justice upon hearing the complaint, ordered that the road should be disallowed: Held, that the appeal against such order was not taken away, because it was not an order of the commissioner alone, but of him and a justice of peace together; and because the tenth section of the general act does not expressly say that the order of the commissioner shall be final respecting private roads. *The King v. The Justices of the West Riding of Yorkshire*, T. 4 G. 4. Page 228

INDEMNITY ACT.

The annual indemnity act is prospective as well as retrospective, and extends to those who may be in default during the time for which it is made, and is not limited to those who had incurred penalties or disabilities before it passed. In *the Matter of Stevenson and Others*, T. 4 G. 4. 34

INSURANCE.

infancy) ratified his contract after he came of age. *Thornton v. Illingworth*, E. 5 G. 4. Page 824

INFERIOR COURT.

See PRACTICE, 28.

INITIAL LETTERS OF CHRISTIAN NAME.

See ANNUITY, 1.

INSOLVENT DEBTORS' COURT, ORDER OF.

See PLEADING, 3.

INSURANCE.

1. Upon a policy of insurance on goods, where the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expenses of such repairs, the master having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses: Held, that the underwriter was not answerable for this loss. *Sarguy v. Hobson*, T. 4 G. 4. 7
2. In covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A. *Higgins v. Sargent, Esq. and Others*, M. 4 G. 4. 348
3. Where a ship is so much injured by perils of the sea as not to be repairable at all, or not repairable without an expence exceeding her value when repaired, the assured may recover for a total loss without giving notice of abandonment.

JURY.

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Cambridge v. Anderton, E. 5 G. 4. Page 691

INTEREST.

See INSURANCE, 2.

JUDGE'S CERTIFICATE.

See COSTS, 2. 6.

JURISDICTION.

1. The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrongdoer, and to deliver it to the rightful owner; and, therefore, where it appeared upon a rule nisi for a prohibition to restrain the Admiralty Court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants, and the latter had not pleaded any title, the Court discharged the rule for a prohibition. *In the Matter of Blanshard, Baxter, and Others*, T. 4 G. 4. 244

JURY.

1. The panel of tales having been quashed in a special jury case, on the ground of unindifference in the sheriff: Held, that a venire facias was properly awarded to the coroner, although two of the special jurymen appeared and were sworn on the former occasion.

Upon an award of tales at Nisi Prius, it is not necessary that the tales should be selected out of persons accidentally present; they may be selected out of persons whose presence the sheriff or coroner

roner has taken previous means to obtain. *The King v. Dolby. T. 4 G. 4.* Page 104

JUSTICES.

1. Prisoners committed to gaol for trial, who are able but refuse to work, are not entitled by law to have any food provided for them by the public; and, therefore, where a magistrate reported, as an abuse, to the justices at the quarter sessions, that untried prisoners had been compelled to work at the treadmill, and the justices at sessions ordered that the treadmill should be applied to the employment of other prisoners as well as those sentenced to hard labour; and that those committed for trial who were able to work, and had the means of employment offered them by which they might earn their support, but who refused to work, should be allowed bread and water only, this Court refused to grant a mandamus to compel the justices to order such prisoners any other food. *The King v. The Justices of the North Riding of Yorkshire, M. 4 G. 4.* 286

2. In assumpsit for money had and received, it was proved that *Yarmouth* has been a borough from time immemorial, and that until the time of Queen *Anne*, the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By statute 1 *Ann.* st. 2. c. 7. all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed, which was done by her charter in the following year. At a meeting duly holden before the defendant, then mayor, (he being by virtue of his office a justice of the peace,) and another justice, for

granting and renewing the licence of publicans, the plaintiff applied to have his licence renewed, and upon having it done, was required to pay, amongst other fees, the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of 65 years: Held, first, that the defendant was not entitled to take any such fee, for the payment for 65 years did not raise a presumption that it had been immemorially paid to the bailiffs or mayor of *Yarmouth*, inasmuch as licences were not granted until the reign of *Edward 6.*, and the defendant as justice of peace was not entitled to any fee for granting the licence. Secondly, that the defendant was not entitled under the 24 *G. 2. c. 44.* to notice of the action about to be brought against him, for that the fee could not have been taken by him as a justice, *colore officii*. Thirdly, that the payment was not voluntary so as to preclude the plaintiff from recovering the money in this action. *Morgan v. Palmer, E. 5 G. 4.*

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KING'S BENCH PRISON.

See PRACTICE 6.

1. Where a lease of premises described them as abutting on "an intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an under lease was granted, describing the premises as abutting on "an intended way," not mentioning the width: Held, that the under-lessee was entitled to a convenient way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury

- injury having been sustained. The underlease was of premises "together with all ways thereunto appertaining. A right of way over the original lessor's soil would not pass by those words. Per *Holroyd J. Harding v. Wilson*, T. 4 G. 4. Page 96

2. Where *A.*, who held premises under a lease which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till *Christmas*, and paid rent at *Michaelmas* and *Christmas*: Held, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at *Lady-day*. *Bishop v. Howard*, T. 4 G. 4. 100

3. Plaintiff demised by indenture to *B.* (defendant's testator) certain premises, to hold for eleven years from the 29th *September* 1809. *B.* covenanted, amongst other things, that he would not, *during the lease*, sell or convey away from the premises any of the straw which, during the *leased term*, should grow upon the premises, (except wheat-straw and rye-straw); and that for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the *thereby leased term*, he, *B.* would bring back a cart-load of dung; and plaintiff covenanted that it should be lawful for *B.* to have the use of the barns, &c. for receiving his crops of corn and hay, which should grow upon the premises in the last year before the end of the term thereby granted, and for certain other purposes until the 1st day of *May* next after the expiration of the said term, without paying any rent for the same. The fourth breach assigned was, that *B.*, *during the said leased term*, to wit, on *September* 30th, 1820, and on divers

other days between that day and *May* 1st, 1821, did remove off from the premises large quantities of hay, wheat-straw, and rye-straw, without bringing back a cart-load of dung for each load of hay and straw. Plea to so much of that breach as relates to removing hay, &c. *during the said leased term*, that *B.* did bring back a load of dung for each load of hay, &c. removed, and demurrer to the residue of that breach. Joinder in demurrer. Defendants also pleaded to all the breaches, except the fourth; and to so much of that as related to removing hay, &c. *during the said leased term*, a release of all causes of action, except such as plaintiff had in respect of *B.*'s not bringing back to the premises manure for the hay, &c. removed after the 29th of *September*, 1820. Demurrer and joinder: Held, that the plea to the fourth breach answered the whole of that breach, and that, therefore, the demurrer to the residue was bad: Held also, that the leased term continued for certain purposes until the 1st of *May*, 1821; so that the release did not extend to all acts of removal done during the *leased term*, and, therefore, the plea of release did not answer so much of the fourth breach as it affected to answer, and being bad in part was bad in toto, *Earl of St. Germain's v. Willan*, T. 4 G. 4.

Page 216

4. Where a tenant occupied, under an agreement containing a variety of provisions, and amongst others, that he should keep the premises in tenantable repair: Held, that the landlord might declare generally "that the defendant became tenant, and in consideration thereof undertook to repair," without setting out the agreement. Where *A.* held premises under a lease containing a clause of re-entry for

that sum remaining out of repair: *A.* entered and repaired: Held, that he might recover from *B.* the sum expended on that occasion. After the repairs were done by *A.*, but before the commencement of the action, *B.* sold his interest in the premises to a person who pulled down and entirely rebuilt them: Held, that this did not deprive *A.* of his right to recover the whole sum expended by him. *Colley v. Streeton*, *M. 4 G. 4.* Page 273

5. Where a lease contained a proviso that if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" Held, that the rent having been in arrear for the time specified, an ejectment might be maintained without actual re-entry, and without any demand of the rent.

After trial, the Court will not relieve the tenant by staying proceedings in the ejectment upon payment of the arrears of rent and costs. *Doe dem. Harris v. Masters*, *M. 4 G. 4.* 490

6. Lessee, who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair those fixtures unless strong

LIEN.

and a criminal untruth, and that the term "false" applied only to the latter, still as the defendants had stated that they communicated the fact from authority, and had not proved that they had any such authority, they must have been guilty of a criminal untruth or falsehood by stating as a fact, the knowledge of which they had derived from authority, that which was untrue, and for which they had no authority.

The jury having retired for a considerable time, returned into court, and desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the Judge answered, "The man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can shew the contrary; and it is for him to shew the contrary." Held, that this answer was correct in point of law, and that the Judge was not bound to answer in the affirmative or negative the abstract question put to him; and assuming that a malicious intention is necessary to constitute a libel, that intention is to be inferred from the mischievous tendency of the publication itself, unless the defendant shews something to rebut such inference, and therefore that the publication of a libel of mischievous tendency having been proved, and the defendant not having shewn that he published it from authority, the jury were bound to find that he published it with a malicious intention. *The King v. Harvey and Chapman. M. 4 G. 4. Page 257*

LIEN.

1. An attorney has a lien upon papers belonging to a bankrupt, not only for

LIMITATIONS, STATUTE OF. 987

his bill for business done, but for the costs of an action brought against the bankrupt subsequently to the issuing of the commission to recover the amount of his bill. *Lambert v. Buckmaster, H. 4 & 5 G. 4.*

Page 616

2. A bill in equity was dismissed, with costs. The plaintiff brought an action for the same cause, and recovered a verdict. The costs in equity may be set off against the judgement, subject to the lien of the attorney. *Harrison v. Bainbridge, E. 5 G. 4.* 800

LIMITATIONS, STATUTE OF.

1. *A. and B. made a joint and several promissory note. A. died, and ten years after his death B. paid interest upon the note. In an action brought upon the note against the executors of A., it was held that the payment of interest by B. did not take the case out of the statute of limitations, so as to make A.'s executors liable. Atkins and Others, Executors, v. Tredgold and Others, Executors, T. 4 G. 4. 23*
2. *A. by means of a misrepresentation, received of B. and several other persons, his tenants, various sums of money, to which he was not entitled. B. applied to him to have the money which he had so paid returned, saying that he and the other tenants had been induced to pay more than was due. A. replied, that if there was any mistake it should be rectified: Held, this obviated the statute of limitations as to payments made by the other tenants as well as by B.*

Plaintiff, an administratrix, after the death of the intestate, made one such wrongful payment as before mentioned, out of the assets: Held, that she might recover it in her representative character.

Upon a replication, that the defendant

MALICIOUS ARREST.

See ACTION ON THE CASE, 3.

MANDAMUS.

1. Prisoners committed to gaol for trial, who are able, but refuse to work, are not entitled by law to have any food provided for them by the public; and therefore where a magistrate reported, as an abuse, to the justices at the quarter sessions, that untried prisoners had been compelled to work at the tread-mill, and the justices at sessions ordered that the tread-mill should be applied to the employment of other prisoners, as well as those sentenced to hard labour; and that those committed for trial who were able to work, and had the means of employment offered them by which they may earn their support, but who refused to work, should be allowed bread and water only, this Court refused to grant a mandamus to compel the justices to order such prisoners any other food. *The King v. The Justices of the North Riding of Yorkshire*, M. & G. 4. 286
2. By charter, a borough was constituted a body corporate, to have perpetual succession by the name of the mayor and free burgesses

NON ARRIVAL.

the aldermen was in a dangerous state of health, and was upwards of seventy years of age, and incapable of performing the duties of alderman and justice of the peace; that of the four burgesses, two were upwards of seventy years of age, and that another was not an inhabitant of the borough. The Court refused to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election. *The King v. The Mayor, Recorder, and Aldermen of the Borough of Fowey*, H. 4 & 5 G. 4.

Page 584

3. Where the charter of a corporation provided that there should be a high steward and an under steward, and imposed upon the latter various judicial and ministerial duties, and did not give him power to appoint a deputy: Held, that he could not appoint a deputy generally to discharge all the ministerial duties of his office; although a bye-law of the corporation required that he "or his sufficient deputy" should attend at every court, to execute the duties of the office.

Quære, Whether he could have made such an appointment for the discharge of any particular ministerial duty. *The King v. Mayor, &c. of Gravesend*, H. 4 & 5 G. 4.

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MEMORIAL.

See ANNUITY, 1, 2, 3, 4.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 2.

NON ARRIVAL.

See CHARTER-PARTY.

OVERSEERS.

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NOTICE OF APPEAL,

See APPEAL, 3.

NOTICE TO QUIT.

See EVIDENCE, 6.

OUTLAWRY.

See PRACTICE, 8.

OVERSEERS.

1. A local act directed that the then overseers of the parish of *W.* should continue to be overseers for the remainder of the current year, and until two others should be appointed, and that two overseers should be appointed annually: Held, that this act did not repeal the statute 43 *Eliz. c. 2. s. 1.*, and that an appointment of four overseers for the parish of *W.* was valid. *The King v. Pinney and Another*, M. 4 G. 4. Page 322
2. Overseers of the poor are bound to endeavour to find work for the able-bodied poor who are out of employment. Quære, Whether they can legally give relief to such persons, otherwise than by setting them to work and paying them for their labour. *The King v. Collett, Clerk*, M. 4 G. 4. 324
3. A parish certificate, purported to be granted in 1761 by *A.*, the only churchwarden, and *B.*, the only overseer of the parish: Held, that it must be taken to have been a good certificate, because it may be intended in favour of such an instrument, that by custom there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them died, and that the certificate was granted before the vacancy

PARTNERSHIP.

1. Where *A.* and *B.* were partners, but the whole of the business was carried on by and in the name of *A.*, *B.* never appearing to the world as a partner; and at the dissolution of the partnership, by effluxion of time, all the partnership stock and effects, by agreement between them, were left in *A.*'s hands, who was to receive and pay all the debts due to and from the concern, and to repay by instalments the capital brought in by *B.*; *A.* having continued to carry on the business as before for a year and a half, when he became a bankrupt: Held, that all the partnership property and effects so left in *A.*'s hands, and also the debts due to the concern, passed to his assignees, being in the order and disposition of the bankrupt within the intent and meaning of the 21 Jac. 1. c. 19. s. 11. *Ex parte Enderby, in the Matter of Gilpin*, M. & G. 4. 389

2. An agreement between *A.*, a merchant, and *B.*, a broker, that the latter should purchase goods for

to carry goods from *London* and deliver them safely at *Dover*. The contract proved was, to carry and deliver safely (fire and robbery excepted): Held, that this was a variance. *Latham v. Rutley*, T. 4 G. 4. Page 20

3. Declaration stated that the defendant being the clerk of the court for the relief of insolvent debtors, wrongfully and maliciously intending to injure the plaintiff, and to cause one S. C., in custody at the suit of the plaintiff, to be discharged out of custody without paying plaintiff his damages and costs, wrongfully and unlawfully issued an order, purporting to be an order from that court, and purporting that the prisoner should be discharged from custody; whereas in truth and in fact, the court did not pronounce any such order, nor give any authority to the defendant to issue the same, by reason whereof the prisoner was discharged from custody: Held, upon error, brought upon a judgment of C. P., given for defendant upon demurrer to the declaration, that it was not necessary to aver that the order had been set aside by the court; for the order was to be considered the act of the officer, and not of the court. *Whitelegg v. Richards*, T. 4 G. 4. 45

4. The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: Held, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles, which were not fixtures, were also left in the house; the demand

described them, together with the other articles, as fixtures, and the refusal was of the *fixtures demanded*: Held, that upon this evidence the plaintiff could not recover them in this action. *Colegrave v. Dias Santos*, T. 4 G. 4. Page 76

5. The court will not compel a defendant to verify his plea. *Merington v. Becket*, T. 4 G. 4. 81

6. It is not necessary in a declaration upon a post obit bond, to aver the death of the person upon whose death the money secured by the bond was to become payable.

A post obit bond (upon which a forfeiture has taken place,) is not within the statute of the 8 & 9 W. 3. c. 11.; and therefore it is unnecessary to suggest breaches.

Semble, that such a bond is within the 4 & 5 Anne, c. 15. *Murray, Administrator, v. The Earl of Stair*, T. 4 G. 4. 82

7. Where a lease of premises described them as abutting on "an intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an under-lease was granted, describing the premises as abutting on "an intended way," not mentioning the width: Held, that the under lessee was entitled to a *convenient* way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained. *Harding v. Wilson*, T. 4 G. 4. 96

8. Where A., who held premises under a lease which expired at *Midsummer*, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till *Christmas*, and paid *rent* at *Michaelmas* and *Christmas*: Held, that this was conclusive evidence of a tenancy, and that the landlord was entitled

entitled to recover a quarter's rent due at *Lady-day*. *Bishop v. Howard*, T. 4 G. 4. Page 100

9. *A.*, by means of a misrepresentation, received of *B.* and several other persons his tenants, various sums of money, to which he was not entitled. *B.* applied to him to have the money which he had so paid returned, saying that he and the other tenants had been induced to pay more than was due. *A.* replied, that if there was any mistake it should be rectified: Held, that this obviated the statute of limitations as to payments made by the other tenants as well as by *B.*

Plaintiff, an administratrix, after the death of the intestate, made one such wrongful payment as before mentioned, out of the assets: Held, that she might recover it in her representative character.

Upon a replication to a plea of the statute of limitations, that the defendant did promise within six years, fraud cannot be set up as an answer to the plea.

Quære, Whether it would be a good answer if specially replied. *Clark, Administratrix, v. Hougham*, T. 4 G. 4. 149

10. An indictment stated, that an ancient bridge, situate within the parishes of *Machynlleth* and *Pennegoes*, was out of repair, and that the inhabitants of the said parish of *Pennegoes* and town of *Machynlleth* aforesaid, from time immemorial, by reason of the tenure of certain lands in the said parish of *Pennegoes* and town of *Machynlleth*, have repaired the bridges: Held, upon error, that the indictment was bad, because it did not appear that the bridge was situate within the town, and therefore that the inhabitants of the town were not liable unless a special consideration were shewn; and that here no sufficient consideration was

shewn, inasmuch as the inhabitants could not hold land, and therefore could not be liable by reason of tenure. *The King v. The Inhabitants of Machynlleth and Pennegoes*, T. 4 G. 4. Page 166

11. The declaration stated that the plaintiff and defendant, by articles of agreement, (reciting that several actions, arising out of the same transaction, had been brought, and defended by the plaintiff, defendant, *G. A.* and *D. A.*, and that in one of them the assignees of one *J. T.*, a bankrupt, recovered against the now plaintiff 2500*l.*, and that disputes existed between the now plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and also concerning the proportion which each was to pay of the said sum of 2500*l.* according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned,) submitted themselves to the award of *J. T.*, *J. R.*, *T. C.*, respecting the said matters. That the arbitrators, taking the said matters into consideration, awarded that the defendant should pay the plaintiff 444*l.*; that five-eighth parts of the costs of the several actions before mentioned should be paid by the plaintiff, and three-eighths by defendant; that the sums already expended by either of them should be allowed as part payment of his proportion; and that when the sum of 444*l.* and the costs were paid, mutual releases should be given. On demurrer: Held, that the plaintiff was entitled to recover; for that, as to the first part of the award, nothing appeared on the declaration to shew that the arbitrators had not awarded the sum of 444*l.*, after taking into consideration

ation the value of the stock and goods, and that it was sufficiently certain; for the plaintiff being originally liable to pay the whole sum of 2500*l.*, must remain liable to pay all but the 444*l.* awarded to him. As to the second part respecting the costs: Held, that it was sufficiently certain, for it would become so upon taxation of the costs by the proper officer; and that it would be final or otherwise according as there were or were not disputes about the sums already laid out. If there were any such disputes, or if the arbitrators did not take into consideration all the matters referred, that should have been pleaded. *Cargay v. Aitcheson*, T. 4 G. 4.

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12. Debt on a bond conditioned for the performance of an award, to be made within a limited time. The declaration, after setting out the condition, stated that before that time expired, the parties to the bond, by deed, agreed to give the arbitrators further time for making the award, and that an award was made within the extended time; and alleged non-performance: Held, upon demurrer, that the action was maintainable upon the bond. *Greig v. Talbot*, T. 4 G. 4. 179

13. An indictment stated that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet, was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: Held, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair.

Quære, Whether the inhabitants

of the hamlet would be liable to repair at common law, if the indictment had contained the latter allegation. *The King v. The Inhabitants of the Extra-parochial Hamlet of Kingsmoor*, T. 4 G. 4.

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14. Plaintiff demised by indenture to B. (defendant's testator) certain premises, to hold for eleven years from the 29th September, 1809. B. covenanted amongst other things that he would not, *during the lease*, sell or convey away from the premises any of the straw which, during the *leased term*, should grow upon the premises, (except wheat straw and rye straw,) and that for every load of hay, wheat straw, and rye straw which should be sold or removed off from the premises during the *thereby leased term*; he (B.) would bring back a cart-load of dung; and plaintiff covenanted that it should be lawful for B. to have the use of the barns, &c. for receiving his crops of corn and hay which should grow upon the premises in the last year before the end of the term thereby granted, and for certain other purposes, until the first day of May next after the expiration of the said term, without paying any rent for the same. The fourth breach assigned was, that B., *during the said leased term*, to wit, on Sept. 30th, 1820, and on divers other days between that day and May 1st, 1821, did remove off from the premises large quantities of hay, wheat straw, and rye straw, without bringing back a cart load of dung for each load of hay and straw; plea to so much of that breach as relates to removing hay, &c. *during the said leased term*, that B. did bring back a load of dung for each load of hay, &c. removed; and demurrer to the residue of that breach. Joinder in demurrer.

demurrer. Defendants also pleaded to all the breaches except the fourth; and to so much of that as related to removing hay, &c. during the said leased term, a release of all causes of action, except such as plaintiff had in respect of *B.*'s not bringing back to the premises manure for the hay, &c. removed after the 29th Sept. 1820; demurrer and joinder: Held, that the plea to the fourth breach answered the whole of that breach, and that therefore the demurrer to the residue was bad: Held also, that the *leased term* continued for certain purposes until the first of May, 1821; so that the release did not extend to all acts of removal done during the *leased term*; and therefore the plea of release did not answer so much of the fourth breach as it affected to answer, and being bad in part was bad in toto. *Earl of St. Germain v. Willan and Another, Executors*, T. 4 G. 4. Page 216

15. Where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from an insurance office: Held, that he might nevertheless maintain an action against the hundred on the 9 G. 1. c. 22. *Clark v. The Inhabitants of Blything*, M. 4 G. 4. 254

16. In the parish of *A.*, two churchwardens were elected for the township of *B.*, and two others for the rest of the parish. Separate rates were made for these divisions: Held, that the churchwardens elected for the township of *B.* might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants. *Astle and another v. Thomas and Baldwyn*, M. 4 G. 4. 271.

17. Where a tenant occupied, under an agreement, containing a variety of provisions, and amongst others that he should keep the premises in tenantable repair: Held that the landlord might declare generally "that the defendant became tenant, and in consideration thereof, undertook to repair," without setting out the agreement. Where *A.* held premises under a lease containing a clause of re-entry for want of repairs, and afterwards underlet a part to *B.*, who undertook to repair within three months after notice for that purpose; the premises underlet being out of repair: *A.*'s landlord threatened to issue upon the forfeiture if they were not repaired, and *A.* gave notice to *B.* to repair. The premises, at the expiration of three months from that time remaining out of repair, *A.* entered and repaired: Held that he might recover from *B.* the sum expended on that occasion. After the repairs were done by *A.* but before the commencement of the action, *B.* sold his interest in the premises to a person who pulled down, and entirely rebuilt them: Held that this did not deprive *A.* of his right to recover the whole sum expended by him. *Colley and another v. Streeton and others*, M. 4 G. 4. Page 271.

18. A count in slander, charging that the defendant had imposed upon the plaintiff the crime of felony, is good after verdict. *Blizard v. Kelly*, M. 4 G. 4. 28

19. Assumpsit by the indorsee against the maker of a promissory note payable to *A. B.* or his order. Plea, first non-assumpsit; and secondly, that *A. B.* became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to indorse the promissory note before the time of indorsement became vested

vested in the assignees, whereby the indorsement by *A. B.* was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the indorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant who had made the note payable to *A. B.*, or his order, was estopped from saying that *A. B.* was not competent to make an order. Secondly, because the property acquired by a bankrupt, subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons. *Drayton and another v. Dale*, *M. 4 G. 4.* Page 293

20. Trespass for breaking and entering the plaintiff's manor. Pleas, first, general issue; second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public navigable river from time immemorial, and that there is in that part of the port which is within the manor, *an ancient* work necessary for the preservation of the port, and for the safety and convenience of the ships resorting to it: that this work was, at the several times when, &c. in decay; that plaintiff would not repair it, but neglected so to do, wherefore defendants entered and repaired. Replication, *de injuriâ*. Verdict for plaintiff on first plea, and for defendants on the second: Held, that plaintiff was entitled to judgment *non obstante veredicto*, as the second plea

did not state that immediate repairs were necessary, or that any one bound to do so, had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port. *Quære*, Whether the plea would have been good, had it contained those allegations. *The Earl of Lonsdale v. Nelson*, *M. 4 G. 4.* Page 302

21. In covenant upon a policy of insurance upon the life of *A.*, payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of *A.* *Higgins v. Sargent*, *M. 4 G. 4.* 348

22. Where *A.* bought goods of a trader, who had previously committed an act of bankruptcy, and paid for them *bonâ fide* without knowledge of the bankruptcy: Held that the assignees under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 *J. 1. c. 15. s. 14.* *Cash and another, Assignees, v. Young*, *M. 4 G. 4.* 413

23. A customer was in the habit of indorsing and paying into his banker's hands, bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount, by checks on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due, and paid: and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to

24. Where certain persons who had been slaves in a foreign country where slavery was tolerated by law escaped thence, and got on board a British ship of war, on the high seas : Held, that a British subject resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship, for harbouring the slaves after notice.
Forbes v. Cochrane, M. 4 G. 4. 448

25. Declaration stated, that by agreement between plaintiff and G. G., plaintiff agreed to sell and deliver to G. G., a lace machine for 220*l.* to be paid thus, 40*l.* on delivery, and the residue by weekly payments of 1*l.*, which were to be paid to defendant, as trustee for the plaintiff, and in case of any default plaintiff was to have back the machine ; and in consideration of the premises, and of plaintiff, at the request of the defendant, appointing him to receive the weekly instalments, defendant promised the plaintiff to take the machine and pay the balance, should there be any default by G. G. in the weekly payments : Held, that this promise was nudum pactum, and void.
Bates v. Cort, M. 4 G. 4. 474

26. Declaration in assumpsit, by the

ment that the bill was presented to *F. W.*, and that he refused to pay, and that notice of such refusal was given to the defendant, and he thereby became liable to pay, and being liable, promised: Held, upon demurrer, that this declaration was bad, inasmuch as if the action was founded upon the bill, the plaintiff could only recover according to the custom of merchants, and by that custom, the plaintiffs as indorsers and drawers would be liable to pay the amount of the bill to the defendant; and if the action was considered as founded upon the special contract, it was not maintainable, inasmuch as there was not any consideration for the defendant's indorsement. *Britten and another v. Webb*, M. 4 G. 4. Page 483

28. Where, in case for slander of title, it appeared by the declaration that the plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant, (from whom he derived that interest,) he had a clear right to dispose of the whole of that interest, but only a doubtful right to dispose of any portion of it; and the plaintiff averred that he put up *his said interest* to auction, and that defendant published a libel of and concerning his right to sell the *said interest*; the evidence being, that he offered for sale a portion of that interest only: Held, that this was a fatal variance.

Millman v. Pratt, M. 4 G. 4. 486

29. By a local act for building a chapel, the trustees therein mentioned were authorised to appoint a treasurer, clerk, and other officers, and out of the monies to be received by virtue of the act to pay such salaries to them as they (the trustees) should think reasonable, and out of the same fund, they were to pay to the curate a yearly

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salary not less than 150l.; they were authorised to borrow any sum at interest, not exceeding 30,000l.; which monies so borrowed, and the interest thereof, were to be made payable out of the burial-fees, and out of rates and assessments to be made in pursuance of the act. They were also authorized to grant annuities, provided the money so raised by annuities did not exceed the whole sum intended to be raised for the purposes of the act. They were authorised also to make an assessment on the occupiers of houses, lands, &c. within the parish, not exceeding 2s. 6d. in the pound on the yearly value, and the rates were to be applied by them to the purposes of that act during such time as any of the monies to be borrowed upon the credit of the act should remain unpaid, or the annuity granted should have continuance; and by another clause, the trustees were empowered to take a distress for the non-payment of the rates. The trustees appointed under this act raised a sum of 32,636l. partly by annuity and partly by borrowing upon common interest; and made a rate to pay the annuities and the interest upon the whole money borrowed. A distress having issued, the plaintiff replevied, and the defendant avowed as collector of the rates imposed by the act. The plaintiff, after setting out several clauses in the act of parliament, pleaded that before the making of the assessment, the trustees had wrongfully borrowed more than the sum of 30,000l. which, by the act, they were authorised to do, viz. 136 by annuities and 2,500l. by borrowing, and that the rates were made amongst others, for the purpose of paying the said annuities and money borrowed. Repliation, that the burial-fees were

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insufficient

the annuities and money borrowed, or any other purpose whatever: Held, upon demurrer, that the plaintiff was entitled to judgment, inasmuch as the act of parliament only authorised the trustees to borrow a specific sum, and the rate having been made to pay the interest due upon the whole sum borrowed, was bad in toto, although the defect did not appear upon the face of it. *Richter v. Hughes*, M. 4 G. 4. Page 499

30. By deed of three parts between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and ~~kids~~: Held, that this deed was legal and binding, and that a plea by the husband that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits charging her with adultery, and that a decree of divorce a mensa et toro was in that cause pronounced, was not a sufficient answer to an action by the trustee

that this evidence did not support the plea, which stated that the note was given to secure the repayment of money actually paid by *W. Amory and another v. Meryweather*, *H. 4 & 5 G. 4.* Page 573

33. In a conviction under the 3 G. 4. c. 110. it is necessary that the offence should appear to have been proved on the oath of one or more credible witnesses; and, therefore, where the conviction stated. "that *R. A.* was convicted of carrying brandy liable to seizure," (without saying upon oath,) and proceeded, "and it is this day in like manner also proved, on the oath of *J. H.*, that the brandy was taken from *R. A.*, and that he was detained by an officer of the navy, &c. : Held, that carrying the brandy was the offence; and as that was not stated to have been proved on oath, the conviction was bad (and that *R. A.* having been committed to prison,) was entitled to be discharged. *Ex parte Aldridge*, *H. 4 & 5 G. 4.* 600
34. In an action by original if the defendant does not appear the bail bond is forfeited on the quarto die post, the other four days being allowed merely *ex gratia*; and, therefore, where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days, it was held, that the penalty of the bond was a debt proveable under the commission, and therefore barred by the certificate. *Coulson, Assignee of the Sheriff of Middlesex v. Hammon*, *H. 4 & 5 G. 4.* 626

35. Where a libel charged the plaintiff with various acts of cruelty to a horse, and, amongst others, with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect; the jury having found that it was true in all particulars, except that

the eye was not knocked out: Held, that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea. *Weaver v. Lloyd*, *E. 5 G. 4.* Page 678

36. The plaintiff's goods were distrained for poor-rates, and upon the sale produced 4*l.* 7*s.* more than was necessary to satisfy the levy; the defendants tendered to him 3*l.* 14*s.*, which he refused to accept, saying that it was too late, but did not then, or at any other time, demand a settlement of the account, and the payment of the overplus: Held, that the 27 G. 2. c. 20. prevented the plaintiff from recovering without making a demand before the commencement of the action, and that the tender did not make such demand unnecessary. *Simpson v. Routh and Others*, *E. 5 G. 4.* 682

37. Where the parish clerk refused to read in a church a notice which was presented to him for that purpose, and the person presenting it read it himself, at a time when no part of the church service was actually going on: Held, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate. *Williams v. Glenister*, *E. 5 G. 4.* 699

38. By the general turnpike act, the trustees of roads are authorised to divert, shorten, alter or improve the course or path of any of the roads under their management, and divert, shorten, vary, alter, and improve the course or path of any roads through or over any commons, or waste grounds, or uncultivated lands, without making satisfaction for the same, and through or over any private lands, tendering

39. In an information on the 5 Ann. c. 14. s. 2. against a carrier between *Norwich and London*, for having game in his possession as carrier, it is not necessary to aver that the defendant is not a person qualified to kill game, nor that he had the game in his possession knowingly. The evidence for the prosecution was, that game was found in the defendant's waggon at an intermediate place between *Norwich and London*: Held, that there was sufficient prima facie evidence that the defendant had it in his possession as carrier. The evidence for the defendant was, that his book-keeper living at that place did not know of any game having been put in there. Neither the driver of the waggon, nor his assistant, was called as a witness: Held, that this evidence did not vary the case, and that the defendant was properly convicted of having the game in his possession as carrier. *The King v. Marsh, E. 5 G. 4. 717*

40. Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action, by entering into an arrangement with him respecting the sale of the goods seized. *Willoughby v. Backhouse and Marshall, E. 5 G. 4.*

that defendant erected a certain dam higher up the stream, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff; and on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant; but added, that defendant had no right to stop the water in the summer-time; the Judge ordered the verdict to be entered for the defendant: Held, that the verdict was right, for flowing water is publici juris, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, and therefore, the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water.

Williams v. Morland, E. 5 G. 4. 910

45. In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff being a trader and being indebted to the defendant in the sum of 100*l.*, became bankrupt, wherefore defendant sued out the commission. Replication, de injuria sua propria. Demurrer, assigning for cause that the plaintiff by the replication had attempted to put in issue three distinct facts, — the act of bankruptcy, the trading, and the petitioning creditors' debt: Held, that these three facts connected together constituted but one entire proposition, and that the replication was therefore good. *O'Brien v. Saxon*, E. 5 G. 4. 908

46. Trespass for breaking and entering the plaintiff's close. Plea, prescribing in right of a messuage and land for a right of common of pasture on a down or common, whereof the close, &c. before the wrongful separation thereof was parcel, and justifying the trespass because the close in which, &c. was wrongfully enclosed and separated from the rest of the common. Replication, that the close in the declaration mentioned in which, &c. was a close called *Burgey Cleave Garden*, and had for thirty years and more been separated and divided and enclosed from the common, and occupied and enjoyed during all that time in severalty and adversely to the persons holding the messuage and land in respect of which the right of common was claimed. Rejoinder, that the close in which, &c. had not been occupied or enjoyed for thirty years or upwards in severalty or adversely as alleged in the replication. The jury found that part of the garden had been enclosed within the thirty years, and that the alleged trespass was committed in that part of the garden only. Held, that upon this finding the defendant was entitled to the verdict, whether the words of the issue, the close in which, &c. constituted an entire or a divisible allegation; if it was an entire allegation, it comprehended the whole of the enclosure to which the name of *Burgey Cleave Garden* attached, and in that case the plaintiff was bound to prove that the whole of the garden had been enclosed upwards of thirty years; or if it was a divisible allegation, it was confined in its meaning to that spot in which the trespass had been committed; and the jury having found that that spot had not been enclosed thirty years,

by reason whereof the plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantages had accrued to him; yet that defendant wrongfully and maliciously intending to injure the plaintiff, and alarm and drive away the rooks, and to cause them to forsake the trees of the plaintiff, wrongfully and unjustly caused guns loaded with gunpowder to be discharged near the plaintiff's close, and thereby disturbed and drove away the rooks, whereby plaintiff was prevented from killing the rooks and taking the young thereof. Plea, not guilty: Held, on motion in arrest of judgment, that this action was not maintainable inasmuch as rooks were a species of birds *feræ naturæ*, and the plaintiff could not have any property in them. *Hannam v. Mockett*, E. 5 G. 4. 934

POOR.

Overseers of the poor are bound to endeavour to find work for the able-bodied poor who are out of employment. Quærc, whether they can legally give relief to such persons, otherwise than by setting them to work, and paying them for their labour. *The King v. Collett Clerk*, M. 4 G. 4. 324

sued upon it. — v. *Johnson*,
T. 4 G. 4 Page 95

3. The panel of tales having been quashed in a special jury case, on the ground of unindifference in the sheriff: Held, that a venire facias was properly awarded to the coroner, although two of the special jurymen appeared and were sworn on the former occasion. Upon an award of tales at nisi prius, it is not necessary that the tales should be selected out of persons accidentally present; they may be selected out of persons whose presence the sheriff or coroner has taken previous means to obtain. *The King v. Dolby*, T. 4 G. 4.

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4. Where a warrant of attorney contained a stipulation that execution might issue upon the judgment, after a year and a day without reviver by scire facias; held, that the parties might lawfully make such a bargain, and that the execution was good. An application was made to set aside the inquisition taken on an elegit, because it appeared that all the defendant's lands were extended: Held, that the inquisition was altogether void, and that the application to set it aside being unnecessary, the rule for that purpose must be discharged. *Morris v. Jones*, T. 4 G. 4.

232

5. The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrongdoer and to deliver it to the rightful owner; and, therefore, where it appeared upon a rule nisi for a prohibition to restrain the Admiralty Court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it

appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants, and the latter had not pleaded any title, the Court discharged the rule for a prohibition. *In the Matter of Blanshard, Baxter, and Others*, T. 4 G. 4. Page 244

6. Where a prisoner is charged in execution, it is not sufficient for the plaintiff's attorney to file the committitur piece in due time with the clerk of the dockets, he must also see that the latter enters it on the judgment-roll within the time prescribed by R., E. T. 41 G. 3.; and if that be not done, the prisoner is entitled to be discharged. *Purdom v. Brockridge*, M. 4 G. 4.

342

7. Prisoners confined in the *Marshalsea*, detected in playing at hazard, punished by the Court. *King's Bench Prison*, M. 4 G. 4.

344

8. The *third* proclamation required by the 31 *Eliz. c. 3.* must be made one month at the least before the quinto exactus. If it be not so made, the Court will reverse the outlawry.

Quære; Whether such reversal is for want of proclamations within the meaning of the 31 *Eliz. c. 3.* or for irregularity. *Taylor v. Waters*, M. 4 G. 4.

353

9. After trial the Court will not relieve the tenant by staying proceedings in the ejectment upon payment of the arrears of rent and costs. *Doe, dem. Harris, v. Masters*, M. 4 G. 4.

490

10. Where, in debt on simple contract, the defendant waged his law, the Court refused to assign the number of compurgators with whom he should come to perfect his law. *King v. Williams*, H. 4 & 5 G. 4.

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3 T 4

11. Judg-

1006 PROMISSORY NOTE.

known to be done for the benefit of the mortgagee. *Scrace, Gent. one, &c. v. Whittington, Gent. one, &c.*, T. 4 G. 4. Page 11

PRISONER.

See CONVICTION, 4. JUSTICES, 2. PRACTICE, 6, 7.

PROHIBITION.

The Court of Admiralty have in a cause of possession jurisdiction to take a vessel from a mere wrongdoer, and to deliver it to the rightful owner; and therefore where it appeared upon a rule nisi for a prohibition to restrain the Admiralty Court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants, and the latter had not pleaded any title, the Court discharged the rule for a prohibition. *In the Matter of Blanshard, Baxter, and Others*, T. 4 G. 4. 244

PROMISSORY NOTE.

1. *A.* and *B.* made a joint and several promissory note. *A.* died, and ten years after his death *B.* paid interest upon the note. In an action brought upon the note against the executors of *A.*, it was held that the payment of interest by *B.* did not take the case out of the statute of limitations, so as to make *A.*'s executors liable. *Atkins and Others, Executors, v. Tredgold and Others, Executors*, T. 4 G. 4. 23

PROMOTIONS.

2. A promissory note for 40*l.*, payable to bearer *generally*, and therefore, in law, payable on *demand*, is within the first class of promissory notes in schedule, part 1., to the 55 G. 3. c. 184., and requires a 5*s.* stamp. *Whitlock v. Underwood*, T. 4 G. 4. Page 157
3. Assumpsit by the indorsee against the maker of a promissory note payable to *A. B.* or his order. Plea, first, non-assumpsit; and, secondly, that *A. B.* became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to indorse the promissory note before the time of indorsement became vested in the assignees, whereby the indorsement by *A. B.* was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the indorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant, who had made the note payable to *A. B.* or his order, was estopped from saying that *A. B.* was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons. *Drayton and Another v. Dale*, M. 4 G. 4. 293

PROMOTIONS, 535. 677.

PUBLIC

PUBLIC HOUSE LICENCE.

See JUSTICES, 3.

RATE.

1. By the *Manchester and Salford* police act, 32 G. 3. c. 69. rates were to be made upon "the tenants or occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coachhouses, brewhouses, and other buildings, gardens or garden-grounds, and other tenements situate within the towns of *M.* and *S.* respectively:" Held, that the owner of certain markets kept in the streets of *M.*, in which various articles were exposed to sale, by persons who paid him for that privilege, but had not any stalls fixed to the ground, was not the occupier of a *tenement* within the meaning of the act; and therefore was not liable to be rated in respect of the profits of such markets. *The King v. Mosley, Bart.*, T. 4 G. 4. Page 226
2. By a local act for building a chapel, the trustees therein mentioned were authorised to appoint a treasurer, clerk, and other officers, and out of the monies to be received by virtue of the act, to pay such salaries to them as they (the trustees) should think reasonable, and out of the same fund they were to pay to the curate a yearly salary, not less than 150*l.* They were authorised to borrow any sum at interest, not exceeding 30,000*l.*, which monies so borrowed, and the interest thereof were to be made payable out of the burial fees, and out of the rates and assessments to be made in pursuance of the act. They were also authorised to grant annuities, provided the money so raised by annuities did not exceed the whole sum intended to be raised for the purposes of the act. They were

authorised also to make an assessment on the occupiers of houses, lands, &c. within the parish, not exceeding 2*s.* 6*d.* in the pound on the yearly value, and rates were to be applied by them to the purposes of that act during such time as any of the monies to be borrowed upon the credit of the act should remain unpaid, or the annuities granted should have continuance; and by another clause, the trustees were empowered to take a distress for non-payment of the rates. The trustees appointed under this act raised a sum of 32,536*l.*, partly by annuity and partly by borrowing upon common interest; and made a rate to pay the annuities and the interest upon the whole money borrowed. A distress having issued, the plaintiff replevied, and the defendant avowed, as collector of the rates imposed by the act. The plaintiff, after setting out several clauses in the act of parliament, pleaded, that before the making of the assessment, the trustees had wrongfully borrowed more than the sum of 30,000*l.*, which by the act they were authorised to do, viz. 136*l.* by annuities, and 2500*l.* by borrowing, and that the rates were made, amongst others, for the purpose of paying the said annuities and money borrowed. Replication, that the burial fees were insufficient to answer the purposes of the act, and that the annuities granted by the act were in existence, and that it was necessary for the trustees to raise money by assessments, in order to carry into effect the purposes of the act, and that the assessments were duly made pursuant to the act, and without stating that the rates were made for the purpose of paying the annuities and money borrowed, or any other purpose what-

1008 SECURITY FOR COSTS.

- whatever: Held, upon demurrer, that the plaintiff was entitled to judgment, inasmuch as the act of parliament only authorised the trustees to borrow a specific sum, and the rate having been made to pay the interest due upon the whole sum borrowed, was bad in toto, although the defect did not appear upon the face of it. *Richter v. Haghes*, M. 4 G. 4. Page 499
3. By 55 G. 3. an appeal is given against a county rate made in fixed proportions, invariably adopted for a series of years. *The King v. The Justices of York*, E. 5 G. 4. 771
4. By a local act, giving to commissioners certain powers to be exercised for the preservation of the town of B. from the encroachments of the sea; it was enacted, that there should be paid to the commissioners any rate or duty which they should think fit to order, not exceeding the sum of 3s. for every chaldron of coal brought or delivered within the limits of the town: Held, that under this act a duty was payable in respect of each quantity of coals, amounting to several chaldrons, brought into the town, although at different times, in several parcels, each containing a less quantity than a chaldron. *Mills v. Funnell*, E. 5 G. 4. 899

RELEASE.

See COVENANT, 1.

REMAINDER.

See DEVISE.

ROAD.

See INCLOSURE ACT.

SECURITY FOR COSTS.

See PRACTICE, 14.

SETTLEMENT.

SELECT VESTRY.

In the parish of W. the poor-rate according to ancient custom, has always been made without respect to the value of the property in the parish, but according to the supposed ability of the party charged. Held, that persons so rated were not rated in respect of any annual rent, profit, or value within the meaning of the 58 G. 3. c. 69. s. 3. and therefore were not entitled to more than one vote at vestry meetings, although rated upon more than 50l. *Nightingale v. Marshall and Another*, M. 4 G. 4. Page 515

SETTLEMENT.

1. Upon the trial of an appeal at the quarter sessions, the respondent parish proved relief granted to the father of the pauper by the appellant parish before the year 1815. The appellant parish then tendered an order of sessions made in the year 1815, quashing an order of justices for the removal of the brother of the pauper to the appellant parish. And they tendered parol evidence to shew that the ground of the decision of the court of quarter sessions was, that the father of the pauper had not at that time any settlement in the appellant parish, and, consequently, that the son had not any derivative settlement there: Held, that even if parol evidence was admissible to prove the ground of the decision of the sessions, still that the order of sessions was not evidence that the father of the pauper was not settled in the appellant parish in 1815, because the father's settlement was a matter that arose collaterally on the trial of the first appeal. *The King v. The Inhabitants of Knaptoft*, E. 5 G. 4.

889

2. An

2. An illegitimate child, born in an extra-parochial place, does not follow the settlement of its mother. *The King v. The Inhabitants of St. Nicholas, Leicester*, E. 5 G. 4.

Page 889

SETTLEMENT — By Apprenticeship.

The statute 56 G. 3. c. 139. s. 1. requiring that the order of justices for the binding out of parish apprentices shall be referred to in the indenture by the date thereof, is compulsory; and therefore an indenture in which the date of the order is omitted, is void, and no settlement is gained by serving under it. *The King v. The Inhabitants of Bawbergh*, T. 4 G. 4. 222

SETTLEMENT — By Estate.

1. A written agreement was made for the purchase of an estate, to be paid for by two instalments; the first was to be payable within a few days after the signing of the agreement, and the last after the expiration of seven months. The vendor was to make out a good title on the payment of the last instalment, and to convey the premises; but the purchaser was to be let into possession upon the payment of the first instalment. The purchaser paid the first instalment, and was let into possession, and continued in possession for a year and a half, but the last instalment was never paid, nor any conveyance ever executed; and the purchaser afterwards gave up the contract upon receiving back part of the first instalment: Held, that under this contract, the purchaser did not acquire equitable estate, so as to gain a settlement under the 9 G. 1. c. 7. s. 5. *The King v. The Inhabitants of Geddington*, T. 4 G. 4.

129

2. A widow before assignment of dower, has not such an interest in the land of which she is dowable, as to be irremovable from the parish in which the land lies. *The King v. The Inhabitants of North Weald Bassett*, E. 5 G. 4.

Page 724

SETTLEMENT — By Hiring and Service.

1. The pauper was hired to serve as a servant in husbandry from Michaelmas 1821, to Michaelmas 1822, at weekly wages; and if he and his master could not agree for the harvest, he was to harvest for himself. Previously to the harvest, the master offered the pauper 5*l.* for the harvest, which he accepted, and continued in the service the whole year: Held, that this was an exceptive, and not a conditional hiring, and that no settlement was gained. *Rex v. Althorne*, T. 4 G. 4.

112

2. A pauper was by indenture hired for a year as a driver in a colliery, at the wages of 1*s.* 10*d.* for a good day's work, not exceeding fourteen hours, and 2*d.* a day more when that time was exceeded, and he was to forfeit 10*s.* 6*d.* for every act of disobedience, and 2*s.* 6*d.* per day for lying idle (to be deducted out of his wages.) There was a proviso, that nothing in the indenture should be construed to oust the jurisdiction of the justices, or to prevent either master or servant from applying to them in case of disputes; and a covenant, that in case the master, about Christmas, should wish to repair any engine, &c. belonging to the colliery, he might stop the workings for any period not exceeding seven days, without paying any wages to the pauper, unless employed in other work: Held, that this was a conditional, and not an exceptive contract

tract, and that the pauper gained a settlement by serving under it for the whole year. *Rex v. The Inhabitants of Byker*, T. 4 G. 4.

Page 114

3. An agreement was made between A. and B., that the latter should serve for three years at 1s. per day, when B. had work to do, and when he had no work, A. was not to be paid. At the time when the agreement was made, the master told the servant that he should not have work for him during the whole year, and particularly during the winter, and that when he had not work for him, he might get work from other people: Held, that this was an exceptive hiring, and that the pauper having worked for other people during the winter season when his master had no work, and having at other times worked for his master during two successive years, did not gain a settlement. *The King v. The Inhabitants of Polesworth*, E. 5 G. 4.

715

4. Where a master, who had hired a servant for a year, at the expiration of eleven months made a complaint against him before a justice of peace, and the latter under the provisions of the 20 G. 2. c. 19. s. 2. committed the servant to the house of correction for one calendar month, which did not expire until after the end of the year for which he had been hired: Held, that this was an abiding in the master's service for a whole year within the meaning of the 8 & 9 W. 3. c. 30., and that the servant thereby gained a settlement. *The King v. The Inhabitants of Hallow*, E. 5 G. 4.

739

5. The father of a pauper aged fourteen years, agreed by parol to give a shoemaker a guinea for teaching his trade to the pauper for twelve months. The son served the twelve months under that agreement. At

the end of that period, the father agreed that his son should work for the shoemaker for twelve months, making shoes at 3d. per pair the first six months, and 4d. per pair the last six months: under this latter agreement the pauper served six months only: Held, that this latter service could not be connected with the service of the former year so as to give a settlement, inasmuch as the first agreement created the relation of teacher and scholar, and not that of master and servant, and the whole year's service, required to confer a settlement, must be under a contract or contracts creating the relation of master and servant. *The King v. The Inhabitants of Saint Mary Kidwelly*, E. 5 G. 4.

Page 750

6. A pauper had been hired three years at 20l. per annum as a looker. The duty of looker is to superintend the flocks and fences of his employer. When he was hired, his master told him that he should not have full employment for him, but that he would employ him as much as he could. He was not to do any work for his master, other than that belonging to the office of looker, without receiving extra wages. During the first year and three quarters he worked for his master only, but was always paid extra for any work not belonging to his office of looker: Held, that there was not any hiring for a year, and that the pauper did not gain a settlement by service under such a hiring. *The King v. The Inhabitants of Lydd*, E. 5 G. 4.

754

7. A pauper was hired to serve for part of a year. Three weeks before the expiration of the period of service, the mistress asked the pauper to stay again. The pauper replied that she had no objection, if they could agree about wages. They

They did agree for 3*l.* 10*s.*, and 1*s.* earnest was paid; nothing was then said as to the time for which the pauper was to serve, but a week afterwards, the mistress said to the pauper, "I have hired you, but mentioned no time; remember, that you are hired for fifty-one weeks," to which the pauper assented: Held, that this was a good hiring for a year. *The King v. The Inhabitants of Market Bosworth*, E. 5 G. 4. Page 757

8. Where a pauper served under a yearly contract in the parish of A., and was afterwards hired in the same parish by the same master for a less period than a year, (there being no interruption of the service,) and during the latter period removed with his master into the parish of B. and served him there: Held, that the pauper acquired no settlement in that parish, inasmuch as no part of his service there was under a yearly hiring. *The King v. The Inhabitants of Apelthorpe*, E. 5 G. 4.

892

SETTLEMENT — By Payment of Rates.

A settlement may be gained by being rated and paying parochial taxes in respect of a tenement, being above the value of 10*l.* *Rex v. The Inhabitants of St. Pancras, Middlesex*, T. 4 G. 4.

123

SETTLEMENT — By renting a Tenement.

1. The pauper was hired for a year as a shepherd: he was to have a house and garden rent-free, 7*s.* a week, and the going of thirty sheep with his master's flock, as wages. He served for two years at those wages, in the parish of I., during all which time the sheep went on

his master's farm, the whole of which was situated in that parish. The feed of the sheep was worth 16*l.* per annum: Held, that that this did not confer a settlement, it not being any part of the bargain that the sheep should be pasture fed.

Semble, That in order to gain a settlement by renting a tenement, the pauper must reside upon some part of it. *The King v. The Inhabitants of Bardwell*, T. 4 G. 4.

Page 161

2. A pauper was hired for a year, and had by agreement a house and garden, a rood of potatoe land, and the keep of a cow on his master's land. After the pauper had served ten years, his cow failing in milk, the pauper had in lieu of the cow two heifers kept for him through the kindness of his master, and not in consequence of any bargain. The potatoe land and the keep of two heifers was of the annual value of 10*l.*, but the potatoe land and the keep of the one cow was of less annual value than 10*l.*: Held, that the pauper, by having the potatoe land and the keep of the two heifers, *before* the passing of the stat. 59 G. 3. c. 50. gained a settlement: but, semble, that by having the potatoe land and the keep of the two heifers after the passing of the 59 G. 3. c. 50. he would not have gained a settlement. *The King v. The Inhabitants of Benneworth*, E. 5 G. 3.

775

- 3 A. hired a house for 10*l.* a year, and put into it his furniture worth above 15*l.*, and lived in it above a year. Having applied for relief, the parish officers were compelled by a magistrate's order to grant it. After the relief was granted, the landlord demanded his rent, but allowed A. a fortnight's time to pay it. Before that time expired, and before the rent was paid, the pauper

Held, secondly, that at the time when the order of removal was made, he had not gained any settlement in the removing parish because he had not then paid year's rent as required by the 59 G. 3. c. 50. *The King v. The Inhabitants of Amphyll*, L. 5 G. 4 Page 84

SHAM PLEAS.

See PLEADING, 5.

SHIP.

1. The 43 G. 3. c. 56. s. 2. prohibits the conveying in any ship from any place in the United Kingdom a greater number of persons than in the proportion of one person for every two tons of the burden of the ship, and every such ship is to be deemed to be of the burden described in the certificate of registry; and if any ship is partly laden with goods, the master is prohibited from taking on board a greater number of persons than in the proportion of one person for every two tons of that part of the ship remaining unladen: Held, under this act that vessels partly laden with goods were to be deemed of the burden described in the certificate of registry. *Rishon and*

SLAVE TRADE.

B. as *C.*'s agents in the concerns of the ship might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares with a stipulation for the appointment to the command, and the continuance of the management, it was illegal and void. *Card and Cannan v. Hope*, *H. 4 & 5 G. 4.* Page 661

SHIP OWNER.

See AVERAGE, 1.

SIMONY.

Where a contract was made for the sale of a next presentation, the parties at the time, knowing the incumbent to be at the point of death, expecting an immediate vacancy: Held, that the contract was simoniacal, and the presentation made in pursuance of it by the purchaser void, although the clerk presented was not privy to the transaction, and the contract was not entered into with a view to the presentation of any particular person. *Fox v. The Bishop of Chester*. *H. 4 & 5 G. 4.* 635

SLANDER.

See PLEADING, 18.

SLAVE TRADE.

Where certain persons who had been slaves in a foreign country where slavery was tolerated by law escaped thence and got on board a *British* ship of war on the high seas: Held, that a British subject resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship for harbouring the slaves after notice. *Forbes v. Cochrane and Another*, *M. 4 G. 4.* 448

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STAMP.

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STAGE COACHES.

See TOLL, 1.

STAMP.

1. A bill was in fact drawn on the 21st day of December for 21l. payable two months after date; but on the face of it purported to bear date on the 31st: it was held to require only a stamp of 2s. which is imposed by 55 G. 3. c. 184. on bills for that sum, not exceeding two months after date. The word date as there used meaning the period of payment expressed on the face of the bill. *Upton and Another v. Marchant*, *T. 4 G. 4.* Page 10
2. A promissory note for 40l. payable to bearer generally, and therefore in law payable on demand, is within the first class of promissory notes in schedule, part 1., to the 55 G. 3. c. 184., and requires a 5s. stamp. *Whitlock v. Underwood*, *T. 4 G. 4.* 157
3. An assignment by indenture of a judgment-debt is not an assignment of property within the meaning of the 55 G. 3. c. 184., sch. part. 1., tit. *Conveyance*, and does not therefore require an ad valorem stamp; but must have the ordinary deed-stamp. *Warren v. Howe*, *M. 4 G. 4.* 281
4. *A.* having consigned goods to *B.*, sent him the following order: "Pay to *A. B.* the proceeds of a shipment of goods, value about 2000l., consigned by me to you." *C.*, by writing, consented to pay over the full amount of the net proceeds of the goods: Held, that neither of these instruments required such a stamp as the stamp acts imposed on bills, drafts, or orders for the payment of money. *Jones and Another v. Simpson and Others*, *M. 4 G. 4.* 318

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STOCK

STOCK JOBBING.

See EVIDENCE, 14.

STOPPAGE IN TRANSITU.

See VENDOR AND VENDEE, 5.

TENEMENT.

See RATE.

TOLL.

By a turnpike act, a toll of 4½d. was imposed upon every horse or other beast drawing any coach or other carriage; for every horse drawing singly any carriage, the same toll; for every horse drawing any wagon or other such carriage drawn by two horses or more, the sum of 3d.; for every horse laden or unladen, and not drawing, the sum of 1d. The statute then provided that no person should be liable to pay toll more than once in any one day at any toll gate for passing and repassing in any one day with the same horses and carriages through the same, but all persons having paid toll once, and producing a ticket denoting the payment of such toll, were afterwards to pass and repass with the same horses and carriages toll free during the same day. A stage coach, drawn by four horses, passed through a gate erected under this act of parliament, and paid the toll. In the evening of the same day, a different coach, called by the same name, belonging to the same proprietor, driven by the same coachman, and drawn by the same four horses, but carrying different passengers and different parcels for hire, passed through the same gate: Held, that a second toll was payable in respect of this

carriage and horses. *Loaring Stone, M. 4 G. 4.* Page 5

TRANSFER NOTE.

See VENDOR AND VENDEE, 5.

TREAD MILL.

See JUSTICES, 2.

TRESPASS.

1. Trespass for breaking and entering plaintiff's manor. Plea, first, general issue; second, that from time immemorial there hath been and still is a public port, partly within the said manor, and also in a river which has been a public navigable river from time immemorial, and that there is in that part of the port which is within the manor an ancient work necessary for the preservation of the port, and for the safety and convenience of the ships resorting to it; that this work was at the several times when, &c. in decay; that plaintiff would not repair it, but neglected so to do, wherefore defendants entered and repaired. Replication de injuria. Verdict for plaintiff on the first plea, and for defendants on the second: Held, that plaintiff was entitled to judgment non obstante veredicto, as the second plea did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port. *Quære*. Whether the plea would have been good, had it contained those allegations? *The Earl of Lonsdale v. Nelson and Others, M. 4 G. 4.*

2. Where the parish clerk refused to read in church a notice which was

presented to him for that purpose, and the person presenting it read it himself, at a time when no part of the church-service was actually going on: Held, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate. *Williams v. Glenister*, E. 5 G. 4.

Page 699

TROVER.

1. The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: Held, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles, which were not fixtures, were also left in the house; the demand described them together with the other articles, as fixtures, and the refusal was of the fixtures demanded: Held, that, upon this evidence, the plaintiff could not recover them in this action. *Colegrave v. Dias Santos*, T. 4 G. 4. 76
2. Where A. bought goods of a trader, who had previously committed an act of bankruptcy, and paid for them bona fide without knowledge of the bankruptcy: Held, that the assignees under a commission issued against the seller could not maintain trover for the goods, the payment being protected by the 1 J. 1. c. 15. s. 14. *Cash and Another, Assignees, v. Young*, M. 4 G. 4. 413
3. A customer was in the habit of

indorsing and paying into his banker's hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him, from the time when made, and upon all payments by bills from the time when they were due and paid; and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson and Others v. Giles and Others, Assignees*, M. 4 G. 4. Page 422

4. A. by contract sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and re-house the same. B. having entered into a contract to sell tallow to C. obtained from the wharfingers and gave to C. a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order: Held, in an action of trover by C. against the wharfingers, that, after their acknowledgment, they held the tallow as the agents of C., and that they could not therefore

set up as a defence a right in *A.* to stop in transitu. *Hawes and Another v. Watson*, *H. 4 & 5 G. 4.*
Page 540

TRUSTEES OF TURNPIKE ROADS.

See ACTION ON THE CASE, 5.

UNDER-LEASE.

See ANNUITY, 8.

VARIANCE.

1. Where a declaration against a sheriff, for taking insufficient pledges in a replevin bond, stated, that the party replevying levied his plaint "at the next county court, to wit, at the county court holden on, &c. before *A.*, *B.*, *C.*, and *D.*, suitors of the court;" which plaint was afterwards moved by re. fa. lo., and by that record it appeared that the plaint was levied at a court holden before *E.*, *F.*, *G.*, *H.*: Held, that the variance was immaterial, for that it was unnecessary to state or prove the names of the suitors, and that they might be rejected as surplusage. *Draper v. Garratt*, *T. 4 G. 4.* 2
2. Declaration, that for certain hire and reward defendants undertook to carry goods from *London* and deliver them safely at *Dover*. The contract proved was, to carry and deliver safely (fire and robbery excepted): Held, that this was a variance. *Latham v. Rutley*, *T. 4 G. 4.* 20
3. Where in case for slander of title it appeared by the declaration that the plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant (from whom he derived that interest) he had a clear

right to dispose of the whole of that interest, but only a doubtful right to dispose of any portion of it; and the plaintiff averred that he put up *his said interest* to auction, and that the defendant published a libel of and concerning his right to sell the *said interest*; the evidence being that he offered for sale a portion of that interest only: Held, that this was a fatal variance. *Millman v. Pratt*, *M. 4 G. 4.*

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VENDOR AND VENDEE.

1. The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: Held, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles which were not fixtures were also left in the house; the demand described them, together with the other articles, as fixtures, and the refusal was of the *fixtures demanded*: Held, that upon this evidence the plaintiff could not recover them in this action. *Colegrave v. Dias Santos*, *T. 4 G. 4.* 76
2. *A.*, being seised in fee of the manor of *F.* and the demesne lands thereof and of all the coal mines lying under the manor, enfeoffed *C. D.* of and in certain closes, except and always reserved to the feoffor, his heirs and assigns, all tithes of corn and grain, and also except and always reserved out of the said feoffment unto the feoffor and his heirs all the coals in all or any of the said lands and premises together with free liberty for them

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the said feoffor and his heirs, and his and their assigns and servants, at all times thereafter, during the time that he (the feoffor) and his heirs should continue owners and proprietors of the demesne lands of F., to sink and dig pits, or otherwise to sough and get coals in all and every the lands and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their free will and pleasure, he, the said feoffor, and his heirs, paying to the feoffee, his heirs and assigns, such satisfaction for the damages as two neighbours, indifferently chosen by the feoffee and feoffor, their heirs and assigns, should from time to time award.

The heirs of the feoffor having for a valuable consideration conveyed to a purchaser in fee the manor of F. and its demesne lands, with its appurtenances, and all the coal mines under (amongst others) the lands in question, &c., it was held, that the coals were, by the exception, reserved to the feoffor in fee, and therefore that they passed to the purchaser; and also, that the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits, and get the coals, so long as he remained owner of the demesne lands.

Semble, That the express liberty is not restrictive of that which would be implied by law to get the coals, and that the purchaser would be entitled to an incidental right to get them co-extensive with his estate. *The Earl of Cardigan v. Armitage*, T. 4 G. 4. Page 197

3. Where A. bought goods of a trader who had previously committed an act of bankruptcy, and paid for them bonâ fide without knowledge of the bankruptcy: Held, that the assignees under a commission issued

against the seller, could not maintain trover for the goods, the payment being protected by the 1 J. 1. c. 15. s. 14. *Cash and Another, Assignees v. Young* M. 4 G. 4.

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4. By the conditions of a sale by auction, the purchaser was to pay 80 per cent. upon the price upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: Held, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other. *Phillips v. Bistolli*, M. 4 G. 4.

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5. A., by contract, sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and rehouse the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers, and gave to C., a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order: Held, in an action of trover by C. against the wharfingers, that, after their acknowledgment, they held the tallow as the agents of C., and that they could not therefore set up as a defence a right in A. to stop it in transitu.

7. Defendants' testator, being sole owner of a ship, signed and delivered to the plaintiff, *G. J. K.*, an instrument, describing the ship as copper bolted (but not reciting the certificate of registry); at the foot of which was written, "Sold the within-mentioned ship to *G. J. K.*" He afterwards executed a bill of sale to the plaintiff in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, and plaintiff declared in assumpsit against the defendants (as executors of the vendor) for the breach of his warranty in that particular: Held that the action could not be maintained, the instrument first mentioned being void by the 34 *G. 3* c. 68. s. 14. *Kain v. Old and Others, Executors, H. 4 & 5 G. 4.*

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8. *A.* and *B.*, (being owners of nine-sixteenth shares of a ship, and also husbands or managing owners,) by deed, sold five-sixteenths to *C.* The deed contained a covenant that *C.* should be appointed to the command of the ship, and that *A.* and *B.* should continue to have the management as husbands, and should elect the tradesmen, and appoint all the officers: and that if

WARRANTY.

WITNESS.

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WARRANTY.

See SHIP, 2.

WITNESS.

See EVIDENCE, 14.

WARRANT OF ATTORNEY.

See PRACTICE, 11.

END OF THE SECOND VOLUME.

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